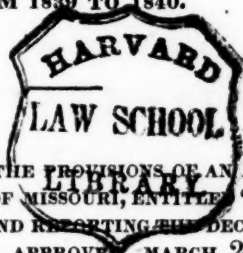


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REPORTS
OF
CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI,
FROM 1839 TO 1840.



PUBLISHED IN PURSUANCE OF THE PROVISIONS OF AN ACT OF THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI, ENTITLED "AN ACT TO PROVIDE FOR THE FILING, AND REPORTING THE DECISIONS OF THE SUPREME COURT," APPROVED, MARCH 20, 1835.

BY S. M. BAY,
Attorney General, and *ex-officio* Reporter.

VOL. VI.

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1841.

REPORTS

OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

STATE OF MISSOURI



BY A. C. B. B.

PRINTED BY THE UNIVERSITY OF MISSOURI

1891

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OF THE STATE OF MISSOURI

1891

1891

JUDGES
OF
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

DURING THE TIME OF THE SIXTH VOLUME OF THESE REPORTS.

Hon. MATHIAS McGIRK, Presiding Justice.
Hon. GEORGE TOMPKINS.
Hon. WILLIAM BARCLAY NAPTON.

ATTORNEY GENERAL.

SAMUEL MANSFIELD BAY.

In cases of appeal, errors shall be assigned, as on writ of error, otherwise, error shall be considered and proceedings shall be had accordingly, and joinder to error in appeal shall be made whenever otherwise the error assigned shall be taken to be confessed, and judgment shall be given accordingly, unless the court give further time.

FOR THE

GOVERNMENT OF THE SUPREME COURT.

I.

The oldest Judge in commission is President of the Supreme Court, and, in his absence, the next oldest in commission shall preside for the time being.

II.

When the Judges deliver separate opinions, the junior Judge shall proceed first, and so on, in order.

III.

The President shall superintend matters of order in the Court House.

RULE IV.

When writs of error issue, a *sci. fa.* to the defendant in error (to hear errors,) shall issue at the same time, and shall be returnable at the same time the writ of error is returnable.

V.

On the return of the writ of error, and *sci. fa.* served, errors shall be assigned within the three first days of the term; joinders in error shall be filed within three days thereafter, if the term should last so long, and if not, then on the first day of the term; otherwise, the errors shall be taken to be confessed, and there shall be judgment accordingly, unless the court, by the consent of the parties, direct otherwise.

RULES FOR THE GOVERNMENT

VI.

In cases of appeal, errors shall be assigned, as on writ of error; otherwise, error shall be considered waived, and proceedings shall be had accordingly, and joinder to error in appeal shall be made *instantly*; otherwise the error assigned shall be taken to be confessed, and judgment shall be given accordingly, unless the court give further time.

VII.

As soon as there is a joinder in error, each party shall furnish to each judge a statement of the case, and the points he relies on.

VIII.

All motions shall be in writing, signed by counsel, and filed of record.

IX.

The parties may, by leave of the court, set their causes for argument on any given day, or the court may set a cause for argument; and where a cause is called, as set for hearing, by the clerk, by the parties aforesaid, or by the court, if either or both parties do not proceed with the argument, the court will take the cause to be submitted, and proceed accordingly.

X.

Each attorney employed in a cause, shall mark his name to the cause, otherwise he shall not be heard on the argument of the same.

XI.

Whenever any alteration is made in the entry of the clerk, a memorandum thereof shall be made in the margin, and signed by the President of the court.

XII.

At the end of each term, and immediately preceding the adjournment of the court, the court shall make a memorandum in the book of judgments and proceedings, which memorandum shall state the number of pages containing the proceedings of that term, and shall state the number of the page of the book where the same ends.

XIII.

The clerk of the supreme court shall, on the first day of each term,

deliver to each Judge a copy of the record in each cause in which there was an assignment of errors at the preceding term, or which may have been filed in his office ten days before the term.

XIV.

The statement of points relied on, to be furnished by counsel to each Judge, shall be delivered on the first day of each term.

XV.

In all cases where the *sci. fa.* is returned not executed, and the defendant in error shall enter a voluntary appearance on the first day of the term to which the *sci. fa.* is returnable, the plaintiff in error shall assign his errors within the three first days of such term; and where the defendant in error shall appear after the first day of such term, he shall give notice of such appearance to the plaintiff in error, or his attorney, on record, who shall assign his errors within three days after such notice given.

XVI.

That all writs of error, (in which a *sci. fa.* shall be returned executed, or the defendant or defendants shall enter a voluntary appearance on the first day of the term to which such writ is returnable,) shall be argued at such term, unless, for cause shown, the court shall grant a continuance to either party.

XVII.

That in all cases where the State may be defendant in error, the notice, required by law to be given, shall be served on the attorney general, or on the circuit attorney in the district where the writ of error is brought.

XVIII.

It shall be the duty of the several clerks of the supreme court, before the commencement of each term of their respective courts, to enter in a particular docket, all causes pending in their said courts, in the order in which they stand in the course of proceeding, setting, as nearly as may be, a due proportion of causes to each day; and put up in a conspicuous place in their respective offices, at least sixty days before the commencement of each term, a list of causes to be tried, specifying the day on which each cause is to be argued, and keep such list so set up until the commencement of the term; and shall, from time to time, add to such docket and list, all causes which may be brought into said court

within the said sixty days, setting them for argument as aforesaid, and all causes shall be argued, or otherwise disposed of, in the order in which they stand on the docket; but by agreement of parties, or the order of the court, any cause may be placed at the foot of the docket, but shall be disposed of when called a second time.

XIX.

In all cases of *scire facias* to revive judgment for the purpose of making it a lien upon lands, the premises upon which it is intended to operate as a lien, shall be specifically described.

XX

The statement of points now required to be made for the use of the Judges, shall consist of a clear statement, in fair, legible writing, of the facts of the cause; and then the points relied on shall be made in numerical order, accompanied with a brief of authorities relating to each point, and the bearing of the authorities on each point shall be noted, with the leading reasons to support the same. These briefs must be delivered on the first day of the term, unless good cause be shown to the contrary. If this rule is not complied with, the court will take the cause to be submitted.

XXI.

No motion shall be argued, unless the court direct the same to be argued; but the parties may make a brief, as by the above rule.

XXII.

The clerks of the supreme court are required to furnish a copy of the record, in every case in the supreme court, to the appellant or plaintiff in error, and to the appellee or defendant in error, if applied for, to be charged in the bill of costs against the unsuccessful party, and collected as other costs.

XXIII.

In appeals in chancery cases, errors shall be assigned on or before the third day of the term to which the appeal is taken, as in cases at law; and if errors be not so assigned, the cause shall be subject to the same rule as for want of assignment of errors in cases at law; provided, however, if the court shall hold three days, and if not, then errors shall be assigned when the court shall direct.

XXIV.

That no member of the bar be permitted to take a record out of court, without leave of the court.

XXV.

Persons applying for license to practice law in this State, shall produce satisfactory certificates of good moral character, from some person or persons, known to one or more of the Judges.

XXVI.

Persons making such certificates shall state therein, whether their belief of the good moral character of the applicant is founded upon their own knowledge, or upon the information of others; and when it is founded upon the information of others, the names of such other persons shall be given in such certificates.

XXVII.

Letters containing, substantially, the same matter required to be certified, will be received in lieu of certificates.

XXVIII.

Points and briefs, for the use of the court, shall be signed by counsel, and the names of the parties endorsed thereon; and also, it shall be stated on the back of said briefs, "Plaintiff's brief," or "Defendant's brief."

XXIX.

The mode of opening a cause shall be by reading, first, plaintiff's brief, and then the adverse counsel shall read defendant's brief.

XXX.

All writs of error shall be returnable to the next term of the court; or if that shall happen within fifteen days after application for such writ, then to the second term; and such writs shall be served at least fifteen days before the return day thereof.

XXXI.

No order for a *supercedeas* shall be granted until after the writ of error is issued in the cause; and, when granted, such order shall be endorsed on the writ by the court or Judge granting the same.

XXXII.

It shall be the duty of the plaintiff in error, to cause his writ of error, with a complete transcript of the record and proceedings in the cause, to be filed with the clerk of the supreme court of the proper district, ten days at least before the commencement of the return term of the writ; and if he fail to do so, and shall not show good cause for such neglect, on or before the second day of the return term, the *supercedeas* (if any) shall be set aside, or the court shall affirm the judgment; and in all cases of such neglect, the defendant in error may continue the cause at his election.

XXXIII.

All applications by either party for the continuance of a cause in this court, shall be made, for reasons filed, stating what exertions have been used to prepare for trial, and supported by affidavit.

XXXIV.

All applications for the postponement of a cause in this court, to a day in the same term, later than that for which it is set, shall be made in the same manner as applications are made for a continuance.

XXXV.

No member of the bar shall, either at the bar, or in the presence of the court, use, towards any member of the bar, or towards any party litigant in court, any language personally offensive.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

FIRST JUDICIAL DISTRICT,

AUGUST TERM 1839.

Garret, vs The State.

Appeal from the Morgan circuit court.

- 1 When a witness is asked on his cross examination, whether, on a former occasion, he has not made certain statements, and answers, that he does not recollect having made such statements, his credit may be impeached by evidence that he did in fact make the statement.
2. An accomplice may be a witness for others joined in the same indictment with himself, provided, he be not put upon his trial along with the others: so if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him as a witness.
3. A witness cannot be permitted to state positively, that a party is not guilty of the offence charged against him. The witness must state facts which are known to him, and from these facts, the jury, under the direction of the court, are to find whether the accused is, or is not guilty.

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122	18

Opinion of the court delivered by Tompkins Judge*

This was a joint indictment against said Garret, Ellison Williams, Young E. Miller, James Williams, and Presly Bryant, for a felonious assault committed on Richard Johnson and Polly Johnson his wife. Garrett was found guilty in the circuit court, and to reverse the judgment of that court he appeals to this court. On the trial of the cause the State

*Note.—Judge Napton having been of counsel in the circuit court did not sit in this case.

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introduced as a witness Polly Johnson one of the persons mentioned in the indictment. She testified that on the night of 28th January 1838, in the county of Morgan after she and her husband had gone to bed, and he was asleep, two men came to their house and went to the fire and stirred it up so as to make a light; they then came to the bed, Garrett. the defendant and appellant, to the foot, and Ellison Williams to the side near the head; that Garrett had a club; she waked her husband, he rose in the bed, and as he rose Garrett beat him down with the club, and then he and Williams dragged him out of the house some distance, and together with Young E. Miller and the other defendants in the indictment, beat, bruised, wounded, and very much abused the said Richard Johnson. Upon the cross examination of the witness, the defendants counsel asked her whether she recognized Garrett, before he came from the fire to the foot of the bed. She answered that she did not, but that when he got to the foot of the bed she discovered that his face was blacked: that she did not on that night observe either the color of his eyes or hair, but that she recognized him from the features of his face and general appearance; that she had never seen him but on three different occasions before that night, and that he was riding or walking by the place where she was standing, that she had never any conversation with him, nor been immediately in his company. The defendants counsel then asked her whether she had not on oath stated, before the committing magistrate before whom the defendant had been brought on the said charge, that she recognized and knew Garrett before he came to the bed, and while he stood on the hearth near the fire, and that his eyes and hair were black: she answered that she did not recollect whether she testified before the justice or not. Garrett then asked her, whether she had not on a former occasion, to wit: the trial of Young E. Miller, testified that the eyes and hair of the defendant were black, and that she knew him by the color of his eyes and hair; the witness answered that she did not recollect whether or not she had so testified. The prisoner then asked the witness whether she had not on several occasions when not on oath declared that Garrett was

the person who came into the house and struck her husband because she distinctly saw him while standing on the hearth, and observed the color of his eyes and hair to be black. To this the witness answered that she did not recollect whether or not she had so stated. The defendant then offered to prove by the justice of the peace, and by other witnesses that the witness had on several occasions stated that the hair and eyes of the prisoner Garret were black, and that it was by the color of his eyes and hair that she recognized him to be the person who struck her husband. The defendant offered also to prove his eyes and hair to be light. The court rejected the evidence and the defendant excepted. The defendant being on his separate trial offered to introduce Young E. Miller, one of the persons indicted as above mentioned, but who was not then on trial, as a witness; the court refused to admit him and the defendant excepted. The defendant then offered to produce the transcript of the proceedings of the justices of the peace, who took the examination of Garret and the other prisoners previously to their commitment on the charge for which they were indicted, to prove that such an examination was had, and offered to prove that on the examination before such justices one Lebo was sworn as a witness on part of the defendants, and that he testified that said Garrett was not guilty of the charge, and that said Lebo, since that time and before the trial of said Garrett, had died; this evidence the court also rejected and the defendant, now plaintiff in error, excepted.

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To Garrett,
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The State.

The plaintiff in error also moved for a new trial and excepted to the opinion of the court overruling the motion, these several decisions of the circuit court are assigned for error, and the counsel of the defendant makes the following points:

1st. That the court erred in rejecting the evidence offered to prove what Polly Johnson had sworn and said in regard to the description of the appellant.

2nd. That the court erred in rejecting Young E. Miller as a witness.

3rd. That the court erred in rejecting the evidence of what Lebo had sworn on the examination before the justices.

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v.
The State.

1st. In third Starkie, p. 1753, it is said "the credit of a witness may be impeached by cross examination subject to rules already mentioned, or by general evidence affecting his credit, or by evidence that he has done or said that which is inconsistent with his evidence on the trial, or lastly by contrary evidence as to the facts themselves."

"But whenever the credit of a witness is to be impeached by proof of any thing that he has said or declared or done in relation to the cause, he is first to be asked upon cross examination whether he has said or declared or done, that which is intended to be proved. If the witness admits the words, declaration or act, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations, of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the court at once, which is the most convenient course."

When a witness is asked on his cross-examination, whether, on a former occasion, he has not made certain statements, and answers, that he does not recollect having made such statements; his credit may be impeached by evidence that he did in fact make the statements. An accomplice may be a witness for others joined in the same indictment with himself, provided he be not put upon his trial along with the others: so if he has pleaded guilty, or been separately convicted, provided

Having always understood this to be the law of the case, I am of opinion that the circuit court committed error in rejecting the evidence to prove the declarations of Polly Johnson the witness.

2nd. An accomplice (2nd Starkie 22) as it seems is a competent witness and may be examined, if he be willing, although he is indicted along with others, provided he be not put upon trial along with the others; for an indictment as to several is several as to each; so if he has pleaded guilty, or been separately convicted, provided judgment has not been pronounced upon him for an offence which disqualifies him. The circuit court, in my opinion, committed error then in not permitting the defendant to examine Miller as a witness.

3rd. The third point is that the court erred in rejecting the evidence of Lebo's testimony given before the examining court. Lebo, it is stated in the bill of exceptions swore that the appellant Garrett was not guilty of the charge made against him.—It is scarcely necessary to say that such testimony was inadmissible. It is the part of the witness to state facts which may be known to him, and from these facts the jury under the direction of the court find whether the

accused is guilty or not guilty. But it is desired that the opinion of this court should be made known, whether the testimony of a witness (since dead) which has been saved by the committing officer can be given in evidence on the trial of the accused, when that testimony is preserved in a proper manner: for it is suggested that the bill of exceptions does not truly represent the testimony preserved by the examining court. In England it has been decided that on an indictment for a rape, the deposition of a girl taken before a committing magistrate and signed by him may after her death be read in evidence at the trial of the prisoner, although it was not signed by her and she was under twelve years of age, provided she was sworn and appeared competent to take an oath.—Swifts digest, p. 125--6: to the same purposes is 1st. Starkie 97 and 2nd Russel on Crimes, 634--5. I am inclined to think on the authority of the books above cited that the testimony of a deceased witness taken, as that of Lebo, is stated to have been, ought to be received in evidence provided the subject matter itself be liable to no objection, as in case of the testimony of this same witness as represented in the bill of exceptions.

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v,
The State,

judgment has not been pronounced upon him for an offence which disqualifies him as a witness.

A witness cannot be permitted to state positively, that a party is not guilty of the offence charged against him, the witness must state facts, which are known to him, and from these facts, the jury, under the direction of the court, are to find whether the accused is, or is not guilty.

For the reasons above given the judgment of the circuit court ought in my opinion to be reversed, and Judge McGirk concurring in that opinion it is accordingly reversed, and the cause will be remanded to be proceeded in conformably to this opinion.

Appellants Brief.

"To reverse the judgment of the circuit court the appellant will insist upon the following points."

1. That the court erred in rejecting the evidence offered to prove what Polly Johnson had sworn and said in regard to the description of the appellant, see Norris Peake 275--6, 1st, Starkie evi. 144--5 3d, Starkie evi. (1753 5) 2d, Russell, on Crimes 577--581, Richard D. Tucker v Welsh 17 Mass Rep. 161.

2d. That the court erred in rejecting Young E. Miller as a witness, 2d Russell on Crimes, 543, 2d Starkie evi. 22 Eng. Com. L. Rep. xxi 471.

2d. That the court erred in rejecting the testimony of

AUGUST TERM 1839. what Lebo had sworn on the inquisition, see Swifts Digest 125-6, 1st, Starkie evi. 97, 4th Binn. Rep. 111, 15th, J. R. 539, 2d, Russell on Crimes 634-5, 1st, Phil. evi. 219 Eng. Com. L. Rep. III. 318."

Nicholas,
v.
The State,

Appellee's Brief.

"1. When a witness is asked on his cross examination, whether on a former occasion he has not made certain statements, and answers that he does not recollect having made such statements, evidence is inadmissible to prove that he did make such statements.

3. Starkie on evi. p. 1753, 4. The Queens' case Eng. Com. Law Reps. v 6. p. 130. Roscoe on evi. p. 141.

2. A party in the same indictment cannot be a witness for his co-defendant, until he has been first acquitted or convicted; and whether the defendants plead jointly or separately makes no difference, 10th John Rep. p. 94 6 Cowen p. 323, 1 Hales' P. C. 306, 6 Term Rep. p. 623."

NICHOLAS VS THE STATE.

1. The circuit court is not bound to instruct the jury upon an abstract legal proposition to entitle a party to an instruction, he must have a suitable case presented by the evidence.
2. The Supreme court will take notice of such facts only as appear on the record.

Opinion of the court delivered by McGirk judge*

It appears from the record that, on the first day of January 1839, the plaintiff being in the custody of the law, Judge Scott made an order to the Sheriff of Cooper county for holding a special term of the circuit court on the 3rd Monday of said month, for the trial of Nicholas: accordingly at the time and place appointed the court was holden, and the grand jury found a bill against Nicholas for stealing a black horse of one John Callaway.

At the same time and place the grand jury also found a bill against Nicholas for stealing a certain Sorrel horse the property of P. R. Hayden. To both these indictments

*NOTE—Judge Napton having been of counsel in the circuit court did not sit in this cause.

the defendant pleaded not guilty, a jury was impannelled in each case, and the prosecution gave full and clear evidence of the defendants guilt. The prisoners counsel then asked the court to instruct the jury in each case, that if they had any reasonable doubt of the guilt of the prisoner it was their duty to acquit.—The judge stated that such was the general law. That such instruction was generally asked and generally given. But that in this case there was no conflicting evidence, and as no suitable case existed to call for such instruction it was an abstraction; he therefore would not give it.

The refusal to give this instruction is complained of as error.

We do not perceive that the court erred in refusing to give this instruction. It has often been holden by this court that the circuit court is neither bound to give irrelevant nor nor impertinent instructions, and that to entitle a party to an instruction asked he must have a suitable case made by the evidence. Here the record does not show such a case, there was therefore no error committed in refusing the instruction asked.

The circuit court is not bound to instruct the jury upon an abstract legal proposition to entitle a party to an instruction, he must have a suitable case presented by the evidence.

Another point was alledged which was that by law a person in jail can only be tried at special term for an offence on which he was actually confined when the the special order was made, and none other.

It is said in this case the defendant was actually acquitted of the offence on which he was in jail confined, and was at the special term found guilty of offences other than those he was in custody for. As to this matter we cannot look into it, the record does not show the fact as stated. By the record all appears regular; there is no error on this point.

The Supreme court will take notice of such facts only as appear on the record.

The judgment in both cases is affirmed with costs.

Wilson for appellants.

There are but two points in this cause.

1. The court had no jurisdiction at a special term, unless the defendant had been charged with the offence for which he was tried and in confinement at the time of ordering the special term, see laws of Mo. 159. sec 48.

2d. The court erred in refusing to give the following instruction for deft. "That the jury must acquit if they have reasonable doubt of his guilty."

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WARBERTON & KING vs A Woods et al.

Warberton &
King,
vs,
A Wood et al.

1. The 52d sect. of the act of the General Assembly "to regulate executions," (R. C. 1835, p. 260,) renders sheriffs liable as well for negligent, as for voluntary escapes. The word "permit," in the sect. includes escapes both negligent and voluntary.

Opinion of the court delivered by McGirk Judge.*

"In the early part of the year 1834, Warberton & King obtained a Judgment in the circuit court of Boon county against one Brewster for about the sum of five hundred dollars, and the same remaining unpaid, the plaintiffs in July 1837, by their agent Wm. L. Vaughn, took an execution on the judgment directed to the sheriff of Morgan county, of which county Woods was the sheriff, and Vaughn shortly thereafter went to the sheriff, and put in his hands the execution and went with him to find Brewster, which they did, and the sheriff arrested Brewster, and Brewster escaped from the sheriff. And this action is brought against the sheriff and his securities on the sheriff's bond to recover in debt the amount of the execution. The defendant pleaded *nil debet*. On this plea the parties went to trial before a jury. It appears, by the testimony of Mr. Vaughn, that in July 1837, he took the execution against Brewster and delivered it to Woods the defendant, who was then sheriff of Morgan county, and that the defendant and himself started there to hunt for Brewster. That on their road to hunt Brewster, Vaughn requested the sheriff to keep the matter a secret, for that if Brewster should know they were after him he would certainly escape. That they found Brewster at the mouth of the creek Gravois, where it empties into the Osage river on the west bank of the same in a rail pen grocery. That the sheriff asked Brewster for various kinds of property of which Brewster replied that he had none, that the sheriff then gently clapped Brewster on the shoulder, and said to Brewster, you are my prisoner; that in a few minutes Brewster turned to Vaughn, and asked him if he was agent for Warberton & King, to which he replied he was. Brewster then said to Vaughn, he wished to speak to him. They then

*NOTE.—Judge Napton, having, been of counsel, did not sit the cause.

FIRST JUDICIAL DISTRICT.

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both arose, and Brewster walked off, and Vaughn followed, ^{AUGUST TERM} 1839. that they walked rather under a hill some twenty or thirty Warberton & yards, and as witness believes out of sight of the sheriff, that King, while there, Brewster made some vague propositions which A Wood et al the witness as agent could not accept. That they were absent near fifteen minutes, and then they returned and found the sheriff still at the rail pen. That Vaughn wished to cross the Gravois to see Miningport, and the sheriff wished to cross also to collect a merchants licence tax, that they all started to go over. Brewster got in the canoe first, sheriff Woods next, Vaughn last, that the river was tolerably high. Brewster paddled the canoe over, Vaughn got out first when they reached the opposite shore Woods next, and that they two walked thirty or forty yards, and that Vaughn hearing a noise back at the canoe turned round, and saw Brewster pushing the canoe out in the stream. Then Vaughn said to Woods. 'see there, Woods.' Woods advanced towards Brewster and said 'do you mean to serve me so:' that then Woods ran down the stream a piece, but could do nothing. Brewster kept out in the stream and escaped, Mr. Woods also summoned persons on the opposite side to take Brewster but they could not.

Vaughn says, Woods asked him for instruction before the arrest, to which he replied he had none to give, and that they could be found in the statutes. The defendant introduced one Hix as a witness who substantially swore the same as Vaughn except that witness says he proposed to take the canoe and take Vaughn and Woods over, and Brewster being present said he had to go over also, and that he would paddle the canoe over, to which it seems neither Vaughn nor Woods made any objection or reply. The foregoing is substantially all the evidence in the cause.

The plaintiff then asked the court to give the jury several instructions, the first of which was, that if they found that Vaughn was present at the arrest and at the escape, and that unless they find that Vaughn expressly consented to the same, then they must find for the plaintiff, which the court refused, but struck out the word *expressly* and then gave the instruction. This alteration of the instruc-

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Warbenton &
King,

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A Wood et al.

tion asked is complained of as being erroneous. This court is of opinion that the circuit court was right in striking out the word *expressly*, because if the agent consented to the escape, this consent may be implied as well as expressed and if the fact existed and was satisfactorily proven, then the consequence would be the same as if the consent had been expressed. There is no error in this point. The court refused to give the 3rd instruction asked by the plaintiff which was, that if the jury believed from the evidence that Brewster, after being taken in execution in the presence of the sheriff, asked Vaughn to walk aside, and that they did do so, and the sheriff made no objection thereto that is evidence of a voluntary escape suffered by the sheriff. I am not exactly prepared to say that the court should have given this instruction, because I am not prepared to pronounce the going under the hill of the prisoner any escape at all. When we look at the condition of all the parties, it is difficult to say what degree of contiguity should have constantly existed between the sheriff and the prisoner to have continued the arrest. It surely cannot be supposed that the sheriff should have, to continue the arrest, kept his hand constantly on the shoulder of the prisoner. If the sheriff kept the prisoner under his power to a common *intent* while thus in the woods, it was enough. In my opinion he did this. I therefore think that this departure down the hill side was no escape at all. In this view of the subject the instruction was rightly refused.

The 4th instruction asked and refused is also founded on the notion that the walk down the hill was an escape, and as the facts do not amount in law to an escape—there is no error in refusing that also.

The 5th instruction asked by the plaintiff was given.

The 6th instruction asked and refused was. That if the jury believed Vaughn acted under a general authority from plaintiffs, this did not authorize him to consent to an escape. I will say but little on this point, as the only escape I can discover in the case was that which took place on crossing the creek, and I see no evidence of any kind to suppose Vaughn consented to that.

The 7th and 8th instructions are about the same, they ask AUGUST TERM 1839.
the court to say there was evidence, in the case, of a negligent escape which the court refused.

The 9th instruction asks the court to say there was no Warberton and King, vs, A Wood et al
evidence in the cause that Warberton & King had given Vaughn any authority to consent to the escape, all these the court refused. The court might, without unjust injury to the defendants right, have given the 9th instruction, as I cannot see any testimony that the plaintiffs gave any such authority unless such authority arises as matter of law out of the general authority. If it does not arise then, if then the question had been fairly put on that point no doubt the court would have responded as the matter stands, I cannot see how the plaintiffs were injured by the refusal. As to the 7th and 8th instructions refused, there is error in refusing them but I will take together the whole matter arising out of this refusal and also the matter arising out of the instructions given for the defendant the first position assumed by the court in the first instruction given for the defendant is that if the prisoner escaped without the consent of the sheriff, then the sheriff is not liable. The 2nd instruction regards the going of Brewster under the hill. As this was no escape I will pay no farther attention to it. Then in the 4th place the court instructed the jury, there were two kinds of escapes in law one voluntary and the other negligent, and that the act of assembly only made sheriffs liable for voluntary escapes. There can scarcely be a doubt that Brewsters escape from the canoe was a negligent escape in the sheriff. The sheriff whose duty it was to take care and keep the prisoner left him free to act as he pleased and he soon put himself in a position beyond the sheriffs power and control. This was negligence in the sheriff and might have been easily prevented. The escape was therefore negligent in the highest degree. The court refused to instruct the jury, that there was evidence of a negligent escape. If the statute only makes a sheriff liable for a voluntary escape then the court did right to refuse these instructions, and did right in giving those given. This brings us to the consideration of the statute on which the action is founded. By the 52. Sec. of the act re-

1839. August Term respecting executions, Revised code 260 it is enacted that "if any officer, to whom any execution shall be delivered, shall refuse or neglect to execute the same according to law, or after having taken the defendants body in in execution shall *permit* him to escape, then and in such cases aforesaid such officer shall be liable and bound to pay the whole amount of money in such writ specified or endorsed thereon." The question raised on this section is what is the legal meaning of the word *permit*. The rule given by Blackstone for for the interpretation of law is this that where words are not technical they are to be understood according to their ordinary common English meaning. *Permit* is not a technical word and in English it has two or three significations, the first is where the mind consents to the act; the second is where the mind does not affirmatively agree to the act but has the right and the means to interfere to prevent the same from transpiring, but for want of care or from laziness or neglect the person makes no move to prevent the act from taking place, according to this meaning of the word where the officer consents to the escape, he has permitted it and is within the statute, and that when he has means to prevent it, and does not avail himself of those means with proper vigilance and in a proper manner he has also permitted the escape, and is also within the statute.

The 52 sect. of the act of the General Assembly "to regulate executions," (R. C. 1835, p. 260,) renders sheriffs liable as well for negligent, as for voluntary escapes the word "*permit*," in the sect. includes escapes both negligent and voluntary. In this case the sheriff acted most imprudently to put all in the prisoners power and that too after he had been secretly admonished by Vaughn that there was danger.—As to the question whether this construction is not severe, my opinion is that the law requires all sheriffs to be vigilant in keeping prisoners. Such is the language of nearly all the books on this point. In this case the sheriff was passive in doing his duty by which passiveness the prisoner escaped him. I conclude he permitted the escape and therefore he is liable on the statute. The 7th and 8th instructions should have been given and those given for the defendant should have been withheld. The judgment of the circuit court is reversed and remanded for a new trial."

Hayden for Plaintiff

"The plaintiffs will insist in this court upon the following ^{AUGUST TERM} points. 1839.

1. That the sheriff Woods was liable in this action if ^{Warberton} guilty either of a voluntary or negligent escape, and to sus-^{and King,} tain it will read the following authorities, see digest 1834-5, ^{vs,} A Wood et al. 260, 52, 53. see section. 3d 579, 580, title sheriffs; and also 13 J. 255 page, 2, R. 131-2 Bonafous vs Walker. 2 Wm. Blackstone 1048, 9 John R. 140, same book 329, Bac 513, 1 Saund R. 35 note (1.) 3 Mass R. 101-2 11 Mass R. 14 Brown vs Getchell et al Mass R. 377.

2. That the sheriff is liable unless the plaintiffs or their agents expressly assented to the escape, and that in this case there is no evidence of such assent, either express or implied, 10 John R. 220-1, see 8 John 347. Jackson vs Douglas. 367 1 Pickering R. 347 see Crany & Morgan vs Turner 6 John 51, 52 3, 10 vol. John R. 59.

3. That the circuit court erred in refusing to give the instructions asked for by plffs. and in giving those which were given for defts."

Miller & Wilson for deft.

"The counsel for defendant will insist upon the following points.

1. That the court very properly refused the instructions asked by plaintiff.

2. That the court did not err in giving the instructions asked by defendant.

3. That if the plaintiffs agent Vaughn consented to walk out of the presence and sight of the sheriff, and did so, it was an escape, for which the sheriff is not liable.

4. That the statute, under which this suit was brought, only extends to cases of voluntary escapes. Holmes vs Lansing 3 John cases 73.

5. That if the sheriff permitted Brewster to escape with the consent of plaintiff's agent, that it is a voluntary escape for which defendants are not liable and that he is not liable for any subsequent escape. 4 Johnson Repts 45, 15 John son 256, 1 Bibb 194."

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1839.

DYER & MASON v. SUBLETTE & CAMPBELL

Same Pltffs. vs, Field & Marks.

Dyer and Ma-
son

v.
Sublette and
Campbell,

In petition in debt, brought by a Mercantile firm, consisting of several partners, on a note executed to them in the name of the firm, it must be averred in the petition that the note set out was executed to plaintiffs by that name. Napton Judge, thought the petition good under the statute, but as a majority of the Court were in favor of re-affirming the decision in the case of Tabor, Shaw and Tatum v Jameson (5th vol. Mo. R. p. 495,) and the question being one of form only, he concurred in reversing the judgment.

Opinion of the court delivered by Tompkins Judge, wit:

Sublette and Campbell sued Dyer and Mason, in the circuit court, and judgment was there in their favor: to reverse this judgment a writ of error was sued out and the cause brought here.

The action was petition in Debt founded on a statute.

The Petition reads thus:

William Sublette and Robert Campbell merchants and traders doing business &c. in the name and style of Sublette and Campbell Plaintiffs, state that they are the legal owners of a note against the defendants William H. Dyer, and Samuel Mason, who carry on the business of merchandise in the name and style of Dyer and Mason, to the following effect: \$183 18 cts., St. Louis March 30th 1839. Six months after date we promise to pay to the order of Sublette and Campbell one hundred and eighty three dollars 18 cts., without defalcation for value received &c.,

In petition in debt, brought by a mercantile firm, consisting of several partners, on a note executed to them in the name of the firm, it must be averred in the petition that the note set out was

To this petition there was a demurrer, and the Circuit Court overruled it.

This is assigned for error. It should have been stated in the petition that this note was made to William Sublette & Robert Campbell by the name and description of Sublette & Campbell, by William H. Dyer and Samuel G. Mason by the name and description of Dyer & Mason, see the case of Tabor, Shaw and Tatum vs Jamison, decided last year at Palmyra, where it is said the words trading under the firm of Tabor, Shaw and Tatum, are merely descriptive of the persons suing, and do not amount to an averment

that the note set out was executed to the plaintiffs by that name. The judgment of the circuit court is reversed, and the cause will be remanded to be proceeded in conformably to this opinion. The cause of Field and Marks vs the same will follow the course of this cause."

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Dyer and Ma-
son
vs,
Sublette and
Campbell,

Opinion of Napton Judge.

"I think the petition is good under the statute, but a majority of the court being in favor of re-affirming the decision in Tabor, Shaw & Tatum vs Jamison, and the question being one of form; I concur in reversing the judgment."

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son (5th vol.
Mo. R. p. 4
94,) and the
question
being one of
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concur in
reversing
the judg-
ment

S. M. Bay for plaintiffs in error.

1. There was no service of process against Mason, and the Circuit Court erred in rendering final judgment against him on the demurrer.

Sec. 13th sect, of 1st art of R. C. of 1835 title practice at law and 2d, sect. of 3d art, same title, Hempstead vs Darby 2 Mo. R. p. 25, Bonny v. Baldwin and Spencer 3d, Mo. R. p. 49.

2. There is no averment in the petition that the note set out was executed to the defendants in error by the name of the firm. Tabor, Shaw & Tatum vs Jameson 3d semi annual decision of S. C. of 5 vol."

Miller for defendants in error.

"The counsel for defendants in error will insist that the court very properly overruled defts. demurrer, and that it did not err in giving judgment against defts."

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TOMBS VS TUCKER.

Tombs,
vs,
Tucker,

- 1 A Court of equity will not set aside a conveyance on the ground of mistake, unless it is clear from the evidence that the party conveying acted under a mistake or misconception in relation to the property conveyed.
2. The declaration of the defendant, that there was a mistake in the conveyance would be strong evidence against him, in the absence of evidence showing clearly that no mistake was made.

Appeal from the Circuit court of Ray county.

Opinion of the court delivered by Tompkins Judge.

Tombs and others claiming as heirs and representatives of Daniel Hudgins filed their bill of complaint in the circuit court against the respondent Tucker stating that in the month of June 1835, Daniel Hudgins sold to Tucker the respondent the south half of the south east quarter of section twenty-one in fractional township fifty one and by mistake conveyed to said Tucker the east half of the said quarter section instead of the south half of the same that after the execution of the deed by Hudgins to Tucker for the east half as aforesaid it was discovered that a mistake was made, and it was agreed that it should be corrected by Hudgins conveying to Tucker the south west quarter of the said quarter section, and Tucker conveying to Hudgins the north east quarter of the said quarter section that is to say, the north half of the east half of the said quarter section, which east half as alleged and stated in the bill; Hudgins had by mistake; conveyed to Tucker instead of the south half that in pursuance of the agreement to correct the mistake; Hudgins in his life time conveyed to Tucker the south west quarter of the said quarter section but that Tucker had failed to convey in exchange for it the North east quarter of the said quarter section and the bill concludes by praying that he may be decreed to convey &c. The answer of Tucker denies that there was any mistake made, and states that Hudgins was the father of his Tucker's wife and intended, had he lived, to give him the whole quarter section but was prevented by his sudden death; the answer denies any agreement betwixt the respondent Tucker and the deceased Hudgins to correct the mistake alleged and stated in the bill, by Tucker convey-

ing to Hudgins the N. E. quarter and Hudgins in consideration thereof conveying to him the S. W. quarter of the quarter section in the bill mentioned. The deeds of Hudgins showed on their face consideration in money. A witness who wrote the two deeds from Hudgins to Tucker stated that when the first deed was written which conveyed the east half of the quarter section, Hudgins produced the two patents for two halves, that is to say, for the east half and the west half of the quarter section, and after a careful examination of them handed to the witness the one for the east half, from which he drew the conveyance to Tucker; and the witness stated it was written according to Hudgins instructions; the witness stated, that after it was written he read it over to Hudgins carefully, and asked him if it was right, and Hudgins answered it was all right.—That when the second deed was written, a mistake in the first was spoken of by some one; but whether Hudgins spoke of the mistake the witness did not recollect. That after the execution of the second deed from Hudgins to Tucker, Tucker said to Hudgins, he would then make a deed to H. but his wife was not there and H. answered, never mind, Kitty (meaning Tucker's wife) will make a deed when I call on her. The complainant then proved that, before the first deed was made, the deceased told the witness that Tucker had *moved out to this country*, and that he intended to give him the south half of the quarter section on which he then lived, that he never intended to put it in the power of one of his children to turn him out of doors, that the deceased lived on the east half of the quarter section which was the same mentioned in the bill.

The same witness further stated that he was at the house of the deceased on the night he died; that previous to his death, he and Tucker walked into the yard, and after expressing to each other their belief that he was dying Tucker observed to the witness that there was a *great mistake* betwixt him and Hudgins which was not then rectified that, H. had conveyed to him the east instead of the south half of the qr. section on which he lived, and to correct the mistake H. had conveyed to him the quarter of the said quarter sec-

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tion necessary to correct the mistake, but that he T. had not on his part conveyed to H. the quarter necessary to correct the mistake, that he T. would have made to H. the deed at the same time H. made to him the last deed, but his wife was not present to relinquish her right of dower: the witness stated that the deceased was a sensible man, and knew as much about his land, and how it was situated and his title papers, as any body; two other witnesses on the part of the complainants testified to similar admissions by Tucker, made after the execution by H. of the second deed to T. A witness produced on the part of the respondent, stated that he went to the house of the deceased before his death, and learned that Tucker was carrying timber to build a house on the South West quarter of the said quarter section and having before understood that a mistake had been made by conveying to T. the east instead of the South half of the quarter section, the witness observed to H. that T. was wrong for building on that quarter, as it had not by mistake, been conveyed to him, to which the deceased Hudgins replied, pshaw, there was no mistake at all and that he intended to convey that quarter to Tucker, he knew what he was about, and that Tucker was right, that as the deceased was returning from the election on the 15th of August the day on which the last deed was executed, he told the witness he had just made Tucker a deed for that forty and that the children were all saying there was a mistake, but there was no mistake at all, and Tucker had a good home. Another witness a grand daughter of the deceased and niece of Tucker's, wife testified that as the deceased was returning from Richmond, on the day he made the last deed to Tucker he told witness he had given Tucker a good home. Witness said to him, what about the mistake, and the deceased said there was no mistake about the land. Another witness stated, that soon after H. had made the first deed to Tucker, Tucker came to the witness and told him that Ballard Hudgins (son of the deceased) said there was a mistake in the land the old man had conveyed him and if so he wished it rectified, and desired the witness to go with him to the old man and mention it to him, that they did so and Tucker said to

the deceased "now, Mr. Hudgins Ballard says there is a mistake in the land you have conveyed to me and if so I am ready to rectify it," to this the old man made no reply continuing to walk the floor and when the matter was urged upon him two other times he replied in a very indifferent manner as if he wished to avoid any further questions on that subject "that if there was any mistake he reckoned it could be corrected," and walked out of the room. This is not all the testimony offered by the respondent, but the most material. From the evidence of the complainants, it appears that the deed first made to Tucker was made with great deliberation, it was stated that the deceased was a sensible man and knew as much of his lands and how they were situated and of his title papers as any man did. The writer of the deeds observed that the deceased, when the first deed was written, took out two patents one for each half of the quarter section and after a careful examination handed him the patent for the east half, and that the deed was written according to his directions, and carefully read over to him by the witness, who asked him if it was right and that Hudgins answered it was all right. It is difficult to conceive how an intelligent man (such he is represented to have been) could under such circumstances make a mistake, but when we add to this that he told two different persons at different times that there was no mistake and that when Tucker, after receiving the first deed and before the execution of the second, went to him to learn if a mistake had really been made—he not only did not admit that any mistake was made but discovered a manifest indisposition to speak about the matter, we are driven to the conclusion that the deceased committed no mistake in conveying to Tucker in the first instance the east half of the quarter section, and that he never intended Tucker to convey him the North east quarter of the quarter section in the bill mentioned. Ballard Hudgins appears to have been the only person to suggest the mistake, and we cannot avoid concluding that the mischievous conduct of the deceased was intended by him to prevent his other children from annoying him with complaints about his liberality to Tucker, who it seems from the testi-

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A court of equity will not set aside a conveyance on the ground of mistake, unless it is clear from the evidence that the party conveying acted under a mistake or misconception in relation to the property conveyed.

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Tombs,
vs
Tucker,

The declaration of the defendants that there was a mistake in the conveyance would be strong evidence against him, in the absence of evidence showing clearly that no mistake was made.

mony, had then lately come to the country and in the words of the witness, had married the pet of the deceased, that is to say in other words, the youngest daughter. Nor is it any injury to the claim of Tucker that he seems to have been himself under the impression the deceased expected him to reconvey to him the North east quarter of that quarter section. His declaration at several times made of his promise to recover would have been strong evidence of his liberality, had it not been so clearly established that the deceased made no mistake and never intended him to reconvey. The decree of the circuit court appears to me to be very correct. Each party pays his own costs because we are to presume that when the complainants filed their bill, they did not know what testimony could be produced against them, and by their own testimony they made out a strong case.

The decree of the circuit court is affirmed, and the appellants will pay costs, the incurred by the prosecution of the appeal.

Adams for appellants.

To reverse the opinion of the circuit court the appellants will rely upon the following points and authorities.

1. "That the court had full power to correct the mistake, see 2d John Ch. Rep. 585, Story's Equity 154.
2. That the proof was sufficient to shew the mistake and if so the court should have made a decree correcting it.
3. That if the proof was not sufficient to correct the mistake, it was at least sufficient to shew that the second deed was fraudently obtained and consequently a decree should have been made to set it aside.

Wilson for appellant.

"In the first place we contend that the evidence of the mistake in this case is not sufficient. The books lay it down that such evidence, in such cases, must be "clear and certain," of the "clearest and most satisfactory character," that it must be "irrefragable proof &c," see, as the great leading case on this subject *Gellespie vs Moore*, 2 J. Ch. R. 585, *Syman vs United States Insurance Co.* 2 J. C. R. 630 *Executors of Getman vs Bundly* 2 J. C. R. 274, *Johnsons*

digest 227. 1. Maddox ch. 50, (N. 2.) 1 semi annual part ^{AUGUST TERM}
Mo. R. 62 Bartlett vs Glascock. 1839.

In the 2d place, we contend that it is not only necessary ^{Davis}
to prove the mistake with sufficient certainty, but to prove ^{vs,}
the real agreements between the parties. Johnsons digest ^{Herring.}
228, Gellispie vs Moore, 2 J. C. 585, Syman vs United In-
surance C. 2. J. C. R. 630.

In the third place, that the acknowledgment of the de-
fendant alone is not conclusive evidence to bind him. Gellis-
pie vs Moore."

DAVIS VS HERRING.

1. In order to take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration,) or an express promise to pay, it, must be proven to have been made within the time prescribed by the statute.
2. Deft. unconditionally promised the agent of plaintiff several times, to renew certain notes held by plaintiff on defendant the notes were not exhibited at the times, nor their amounts stated. Held to be a sufficient promise to take the case out of the statute limitations.

Opinion of court delivered by Napton Judge.

"This was an action of debt brought by Davis, as Execu-
tor of Rebecca Herring, against the defendant David Her-
ring on a bond and a note given by defendant to testatrix.
Defendant plead the statute of limitations. Upon the trial
plaintiff offered the testimony of one Bagby, to take the
case out of the statute, and the only point raised here is as
to the sufficiency of this evidence. The witness stated, that
the testatrix left the two notes sued on with him as an agent
to get them renewed by defendant, and that he applied to
defendant as such in the year 1835, to get them renewed—
that defendant promised to do so, and failed—that he again
promised to renew the notes and said he would do it on
Monday morning—that it was then too late in the evening,
and before Monday testatrix died. The witness further
testified, that at the same time the notes were placed in his
hands by testatrix, she also placed some accounts for settle-

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vs
Herring,

ment against defendant; that his application to defendant at each time was for him to come to testatrix's house and make a settlement of the accounts and renewal of the notes—that he did not know the amount of the accounts—nor he did show to defendant either of the notes, nor state to him their amount—that he never knew of any other notes held by the testatrix on defendant than the two he held and that they are the notes sued on.—On this evidence the court gave judgment on the notes and defendant moved for a new trial, and in arrest, which motions were both overruled.

Both parties refer to the decision in *McKean v. Tharp* 4 Mo R, 358, for the rule which is to govern this case. It is unnecessary to review the authorities upon which that case was decided. The principle established by the court was, that in order to take a case out of the statute of limitations, an express acknowledgement of the debt, as a debt due at that time, (coupled with the original consideration) or an express promise to pay it, must be proven to have been made within the time prescribed by the statute. The court say that “if the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate.” Let the case at bar be tested by this principle. The defendant when called on by the agent of the testatrix and requested to renew the two notes (or the bond and note) held on him by the testatrix, promised to renew them. Failing to do so, the agent again called on him, and he again promised to call at the house of the obligee, on a specified day and renew the notes.

In order to take a case out of the statute of limitations, an express acknowledgement of the debt, as a debt due at that time (coupled with the original consideration,) or an express promise to pay it must be proven to have been made within the time prescribed by the statute. In dept. unconditioned promised the agent of pliff. but several times, to renew certain notes held by on dept. was exhibit ex-
he

I cannot see any doubt or uncertainty in this promise, which was, to all intents, a promise to pay and to pay a certain sum. For it is fair presumption, that defendant was acquainted with the amount for which he had executed his note to the testatrix.—This promise is unequivocal, unconditional and determinate. In the case of *Bell and Morrison*, (Peters Rep. 351) the acknowledgment of the defendant was, that there was something due, but he knew not how much and could not tell until he had recourse to certain

books, and then a specific sum, by way of compromise was ^{AUGUST TERM} offered. 1839.

In McLean adm'r v. Tharp, the defendant stated to a Davis, witness, that "he must have some money or plaintiff would ^{vs,} sue him," and this was held to be insufficient. The court Herring, thought the acknowledgment not sufficiently unequivocal, times, nor their amounts stated. Held to be a sufficient promise to take the case out of the statute of limitations. and not an acknowledgment of a subsisting and specific debt, much less a promise to pay. These acknowledgments as well as those in Gray v. Lauridge (2 Bibb 285) and Bell v. Rowland's administrators (Hardins R. 301) and Harrison v. Handly (1 Bibb 443) are clearly distinguishable from the one disclosed in this record, which comes fully up to all the requisites called for by the principle of these decisions. The judgment of the circuit court is therefore affirmed."

Davis for Plaintiff.

The case is brought here by writ of error.

And the sufficiency of the facts sworn by that witness to take the case out of the statute of limitations is the question now made for the decision of this court, see the case McLane admr. of Brockman vs Tharp 4 Mo. decisions 256, and books there cited."

Clark for defendant.

"The only material point I consider in this case is whether the evidence given by plaintiff of the promise to pay, was sufficient to take it out of the statute of limitation. We think it was and rely upon the authority of McLean vs Tharp decided by this court, and reported in the fourth vol. Mo. Rep. 256.

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HIBLER VS SERVROSS.

Hibler,
vs,
Servross,

1. In an action for slander, the plttf. alledged in his declaration, that the slanderous words were spoken in relation to his testimony in a suit, in which S. was plttf. and H. deft. and offered to substantiate this allegation by the record of a suit between S. and W. plttf. and H. deft. the court held that there was no rational variance in the record, as the suit was in fact between S. as plttf. and H. as deft. although there was still another plttf. and the record not being the foundation of the action, and not set out by its tenor, and the material point of enquiry being the existence of a judicial proceeding in which perjury might be committed, evidence aliunde was admissible to indentify the record offered in evidence with the one referred to in the declaration.
2. But where the deft. in his plea of justification, alledged the existence of a suit in which plttf. had committed perjury between S. and S. as plttfs. and H. as deft. and offered in evidence the record of a suit between S. and W. as plttfs. and H. as deft. the court held that the variance was material, and the record properly excluded, as the deft. having misdescribed the suit no proof could indentify it with the record which was contradictory and repugnant to the allegation.

Opinion of the court delivered by Napton Judge.

"This was an action of slander, brought by defendant in error against Servross in the Chariton circuit court. The several counts in the plaintiffs declaration in substance alledge, that a suit had been pending and lately determined before one Hubbard Short, a justice of the peace, wherein, said Servross was plaintiff and said Hibler defendant, and that the slanderous words charged were spoken of and concerning said suit and the evidence given by Hibler at the trial thereof. The defendant plead not guilty and justification. The plea of justification alledged, that the plaintiff had committed perjury in a suit that had been pending before said Short, wherein Hiram Servross and Samuel Snowdown were plaintiffs and John Hibler defendant. On the trial, the plaintiff introduced a certified copy of the record of justice Short of a suit wherein Hiram Servross and Samuel S. Whitesides were plaintiffs, and John Hibler defendant, having first proved that the plaintiff was sworn as a witness in the case and that the words were spoken of and concerning that suit. To this defendant objected, but the court overruled his objection and permitted the evidence to go to the jury. After the plaintiffs evidence was closed, defendant, in support of

his plea of justification, offered to give in evidence the same AUGUST TERM 1839.
 record of the suit between Servoss and Whitesides plaintiffs
 and Hibler defendant, but the court refused to permit the Hiber,
 same to be read. Verdict and judgment were given for vs,
 Servoss,
 plaintiff. The decision of the circuit court, in permitting
 the record of the proceedings before the justice to be read
 in evidence by the plaintiff, and refusing to allow the same
 to be read by the defendant in support of plea of justifica-
 tion, is assigned as error in this court.

It is clear, that if the record had been the foundation of
 the action, or the record had been set out by its tenor, the
 slightest variance would have been fatal. But in this case,
 the declaration did not profess to set out the record of the
 justice with a prout patet per recordum, but merely vouched
 the same by the name of the justice, the names of the par-
 ties, the time of trial &c. In the case of Miller and Mar-
 tin (2 Mo. Rep. 135) this court recognized the distinction
 between a declaration upon judgment, or one in which the
 judgment was the foundation of the action, and a case like
 the present, in which the declaration merely states the sub-
 stance of the record, and where the material point of en-
 quiry was the existence of a judicial proceeding, in which
 perjury might be committed. A variance in point of time
 between the record produced and the one prescribed in the
 declaration, was held not to be fatal. The court thought the
 material fact averred was the existence of a suit between
 the same parties and that evidence aliunde the record could
 be adduced to identify the transaction with the one described
 in the record. Altogether it appeared on the face of the re-
 cord to have occurred at a different time from the time laid
 in the declaration.

This decision was made on the authority of Purcell v Mac-
 namara, 9 East. 157, and that decision as well as the case in
 East, seems to rest on the principle, that the fact relating
 to the time was not a material fact in the allegation, and not
 having been alledged with a prout patet per recordum, the
 plaintiff is not held to strict proof.

Whether the principle of the decision of Miller and Mar-
 tin will reach the names of the parties as well as the time

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laid in the declaration, may be tested by the reason of the rule. The names of the parties are certainly no more descriptive of the proceedings before the justice than the date of the trial, and if the existence of the indetical suit set forth in the plaintiffs declaration can be established, an imperfect description of its title would not be fatally defective.

The case of *Rex v. Benson* (2 Camp 508) settles this question so far as authority can go.

This was an indictment for perjury in answer to a bill in chancery, and the bill was stated in the indictment to have been filed by one T. "against the said William Benson and another." In fact, the bill was filed against Benson, one Davis and the Attorney General; Lord Ellenborough said, "in point of fact, the bill was filed against Benson and another, although there was still a third defendant. The question was material as between T. and Benson, and it would have been quite enough to have stated that the bill was filed against the latter. I do not think it any material variance that the bill is alledged to have been filed against him and another.

So an allegation in perjury that the oath was taken before E. W., one of the justices of assize, is proved by evidence that it was taken before E. W., and another justice of assize, 3 Stark. ev. 1585 citing Leach's C.C. 1. 179.

From these cases it may be inferred that the allegations in the declaration in relation to the names of the parties, and the name of the court, was not held to be so material as to require the party to set out either at large, and he consequently was allowed to fill up by oral testimony the deficiencies of his declaration.

The case now before the court stands upon the same grounds. The plaintiff alledged in his declaration that the slanderous words were spoken in relation to his testimony in a suit, in which Servoss was plaintiff, and Hibler defendant. He offered to substantiate this allegation by the record of a suit between Servoss and Whitesides as plaintiffs, and Hibler defendant. In point of fact, as Lord Ellenborough said in *Rex against Benson*, it was a suit between Servoss and Hibler, although there was still another plaintiff.

But the defendant in support of his plea of justification, offered to read the same record of the suit between Servoss and Hibler, and the court very properly excluded it. The names of the parties were certainly no more material in this case than the other, but no proof in this case could indemnify the record.

The plaintiff had made an imperfect description of the suit, which was correct as far as it went, and this imperfect allegation he could supply by testimony aliunde. But the defendant in his plea misdescribed the suit. He averred a suit of Servoss and *Snowdown* against Hibler, and offered the record of a suit of Servoss and *Whitesides* against Hibler. No proof could reconcile these transactions to be the same, and his averments and proof were contradictory and repugnant. The defendant thought proper to describe all the plaintiffs, and must be held to his description, but the plaintiff's proof was so wise inconsistent with his allegations.

And this is all I apprehend, which the cases, cited by the counsel for the plaintiff in error, go to establish. These cases may well be reconciled with the decision of Lord Ellenborough in *Rex v. Benson*.

In the case of *Woodford v. Ashby* (2 Camp. 193) the declaration which was for a malicious prosecution, alleged that the person prosecuting was acquitted by a jury in the court of our Lord the King, before the King himself at Westminster, before the chief justice," and the record showed that the trial took place before the chief justice at Nisi Prius. The plaintiff having undertaken to set out the particular court before which the trial took place, could not be allowed to prove that it was a different one from the one described.

Rex v. Taylor (2 Camp. 404) which was an indictment for perjury, the indictment proposed to set out the substance of a deposition before a magistrate, and supplied a word, necessary to the sense which had been omitted in the deposition, and the variance was held fatal. This is not at all apposite to the present case, as the deposition was clearly a material matter in the prosecution, so the case of *Rotale v. Shutter* (1 H. Bl. R. 49) is an instance of an action founded on judgment, and that a variance in such is fatal, is indisputable.

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deft. and offered to substantiate this allegation by the record of a suit between S. & W. Pltffs. and H. def. the court held that there was no material variance in the record, as the suit was in fact between S as plttf. and H. as def. although there was still another plttf. and the record not being the foundation of the action, and not set out by its tenor, and the material point of enquiry being the existence of a judicial proceeding in which perjury might be committed, evidence, aliunde was admissible to identify the record offered in evidence with the one referred to in the declaration. But where the def. in his plea of justification

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existence of
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which plttf.
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between S. &
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table. Upon the whole, the court committed no error, either in allowing the plaintiff to give in evidence the record in support of the allegations of his declaration, or in refusing to allow the defendant to read the same to sustain his plea.

Judgment is affirmed.

Davis for Plaintiff.

"It is contended that in this action, it being for a charge of perjury, the plaintiff in order to show that the charge 'swore a lie,' implies perjury, must allege that the words were spoken in reference to some legal proceeding in which perjury may be committed by a witness. See Mahan vs Berry 6th semi-annual of 5th vol. Mo. decisions.

And that in this case the declaration must show a judicial enquiry, and although the record of which is not the foundation of the action, yet it is indispensable to the action, and that the party must describe the trial by the name of the justice, the names of the parties, the dates, place &c. and that a variance in the description of the record from the allegation in the declaration is fatal see 3 Starkie evi. 1598, to 1602, 1st Phillips evi. 172, see Rastall vs Shanton H. Blackstones R. 49, 2 Camp R. 493, Woodford vs Ashby. Goodis vs Wheatly, 1st Camp Rep. 231 "Rex vs Taylor 404. Martin vs Miller, 3 Mo. decision 135, Coleman vs Edwards 4 Bibb 347."

Clark for defendant.

1. The name and style of the suit tried before the justice was not alledged by the plaintiff as descriptive of the justices record, and that the variance in the names is therefore immaterial, 2d, Mo. Rep. Martin vs Miller 135, 3d, Starkie ev. 1593-8, 4th Camp. N. P. R. 36, 8th John Rep. 455, 9th East 157, 3d, Starkie 1584-5.

2. That an allegation in a declaration that a suit had been depending between S. plaintiff and H. defendant is satisfied by proof of a suit between S. and W. plaintiffs, and H. defendant, all that was alledged being true, the additional name not being contradictory or repugnant to the aver-

ment, 3d, Starkie evi. 1584-5 and the authorities there cited AUGUST TERM
2d Camp. N. P. Rep. 508 pr. L. Ellenborough. 1839.

3. "That the averment of the existence of the suit, before the justice was not verified by the record and if taken must strongly against the plaintiff was only an imperfect description and could be supplied by proof aliunde the record which was done in this case, see authorities cited above."

Bibler,
vs
Scribner,

RAYMOND VS FISHER & HANSON.

An action of covenant cannot be sustained on a covenant modified by a subsequent parol agreement.

Opinion of the court, delivered by Napton, Judge:

"This was an action of covenant brought by Raymond against the defendants, Fisher and Hanson, in the Boon circuit court. The covenant declared on was executed by the parties on the 23d of September, 1838, by which Raymond contracted to deliver, by the first day of November following, at Rocheport, two flat boats, of specified description, and the defendants agreed to pay therefor, on delivery, three hundred and sixty dollars, and a penalty of three hundred dollars, in the shape of liquidated damages, was agreed to be paid by the failing party.

The declaration alleges that, after the date of the covenant so made, on the 10th of October following, a parol agreement was made between the parties, that the time for the delivery of the boats should be extended until the 15th day of November following; that in pursuance of said agreement, plaintiff completed and delivered one of the boats made in pursuance of the plan in the covenant, and that defendants accepted the same and that on the 14th day of November, before the time agreed on by parol expired, said defendants hindered the plaintiff from completing and delivering the other boat, by declaring they would not receive the other boat, &c. The breaches assigned are for the penalty and the price of the boat.

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Fisher and
Hanson,

To this declaration, defendants demurred generally, and the circuit court sustained the demurrer.

The only question is, whether an action of covenant can be sustained on a covenant modified by a subsequent parol agreement. It must be admitted, that the question is not without its difficulties, whether reviewed as one of mere precedent, or as involving the very rights of the parties. The courts of New-York, especially, have so connected their opinions in relation to the rights of the parties to contracts, some of which this court in the case of Helm and Wilson, (4 Mo. R. 45) have solemnly disclaimed, with their adjudications as to the remedies for the establishment of those rights, that it may not be very easy to extract any general and fixed rule of practice from the cases determined by that court.

I apprehend, however, that notwithstanding a conflict of decisions may be discovered, it may be safely affirmed that the question arising on this demurrer is merely a question as to the form of action. The law must be regarded as settled, that a sealed contract may be modified as to the time of performance by a subsequent parol agreement. *Colgan vs Sharp*, 4 Mo. Rep. 41, 481, 2d Cond. Rep. 581.

This court has also decided, that where there is special contract, and the plaintiff seeks to recover the value of his work done in accordance with such contract, he must declare on the special contract, and if his entire completion of the work in accordance with the terms of the contract has been prevented by the acts of the other party, he may allege such prevention as an excuse for non-performance. *Clendennin v Paulsel*, 3 Mo. Rep. 320. *Crump v Mead*, ib 223; *Helm v Wilson*, 4 Mo. Rep. 45. In the two first cases, there were covenants between the parties, and the court declared that the plaintiff must recover on the covenant; but I do not understand the court to intimate that if the covenants have been varied by parol agreement, they can still declare in covenant, though it may be well inferred that they must declare specially. The question, as I take it, is therefore still open so far the decisions of this court are con-

cerned, whether a sealed contract can be declared on in ^{AUGUST TERM} covenant, with an averment that by a subsequent parol ^{1839.} agreement the time of performance was enlarged.

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Fisher and
Hanson,

It is incontrovertably settled, that where a covenant has been modified by a subsequent parol contract for enlarging the time of performance, and the plaintiff declares on the covenant, *without any averment* of such subsequent agreement by parol to dispense with the time, he cannot recover. Sittler v Holland 3. T. R. 590. Phillips v Butler 8. John R. 392 Freeman v Adams 9 J. 115. Stetville v Miles 2 Marsh. 425, Harrison v Taylor 3 Marsh, 154. The leading case on this subject is the case in Dunford and East, of Sittler against Holland. The plaintiff had covenanted to build two houses for £500 by a certain day, and in an action of covenant for the money, averred that the houses were built in the time;— to which defendant pleaded, that the houses were not built in the time. Plaintiff proved on the trial, that the parties had, by a parol agreement subsequent to the date of the articles, enlarged the time, and that the whole work was finished before the expiration of the enlarged time. Lord Kenyon said—"This point is so clear, that I am not inclined to grant a rule to shew cause. The declaration charges that the parties had stipulated by deed to perform a specific thing on a certain day; then if the plaintiff, who sues on contract, be not bound to prove it as fact, the defendant has no notice of that which he is called on to answer."

This brings us to the question, whether, if the plaintiff avers in his declaration the existence of the parol agreement as an excuse for the non performance of his covenant within the time, he can then be allowed to recover. If Lord Kenyon put the decision in Sittler against Holland on the true ground, that of surprise, then it would seem very clear, that where the proper averments were introduced, that objection would be obviated and the action sustainable. But I apprehend, that this was some of the grounds only—for he proceeds—"I remember an action being brought many years ago by Mr. Garrick, or one of the managers of the

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Hanson,

theatre, against Barry for not performing his contract. It appeared on the trial, that the manager had given the defendant a *parol* license to be absent, but the articles, on which the action was founded, required such a license to be *in writing*, the court held that it could not be dispensed with, and that the *parol* agreement was no answer to the plaintiffs action; though perhaps the defendant had another remedy in a court of equity."

From this it would seem to have been the opinion of the Chief Justice, that a *parol* agreement could not be set up even by the defendant to vary the terms of a sealed instrument—a length to which the more modern cases have never gone.

The case of Langworthes and Clark against Smith (2 Wend 587) is decisive of this question, so far as the opinion of the New York courts can settle it. The action, in that case, was covenant, and the declaration alledged a contract under seal, by which the plaintiff covenanted to erect a certain bulk head in the East River, to be completed by a certain day, and further averred, as an excuse for non performance by the day specified in the covenant, an enlargement of the time by *parol* agreement. Savage C. J. said, "There can be no doubt that a *parol* enlargement of the time set in a sealed instrument for the performance of covenants is good; but there can be as little doubt, at this day, that where there is such enlargement of a condition precedent, the plaintiff loses his remedy upon the covenant itself, and must seek it upon the agreement enlarging the time of performance." The English cases, upon which the decision was rested, are the case of Sittler against Holland, above referred to, and the case of Brown v Goodman cited in 3 Term R. 592. The first case, as we have seen, does not entirely sustain the position of C. J. Savage. Brown and Goodman was an action on an arbitration bond, in which the time was limited for the arbitrator to make his award. The declaration averred, that the time was enlarged by mutual consent, and that the award was made within the enlarged time. On demurrer, Lord Kenyon said, the plain-

tiff had no remedy on the bond; by that, the defendant had bound himself to abide an award to be made within a given time, but that could never extend the penalty to an award made under a new agreement. In this case of Brown and Goodman, the true principle is disclosed, upon which all the New York cases must rest. The sealed contract cannot be made to embrace within the sanctity of its seal a subsequent parol agreement. If the party, by agreement chooses to lose the higher security of a specialty by suffering a variation from its terms, he must abide by his diminished security. He can no longer declare on the sealed instrument, as containing the terms of the contract upon which he asks a recovery, because the proof, which he will have to offer, will exhibit a fatal variance from that contract. He cannot declare on the sealed instrument, and seek to remedy his fatal mistake by averring the subsequent parol agreement, because he then declares virtually on a covenant, which has no existence, a part of the essence of the covenant declared on being, in point of fact, a mere parol agreement. And this I take to be the true principle to be extracted from the cases.

It is obvious, that Lord Kenyon did not place the decision in *Little v Holland* on the true ground, when he placed it on the ground of *surprise*. If this were the only objection, it is clear that a replication could have obviated it, and if a replication could have set up the new contract in excuse, it is equally clear that no good reason exists, why the same matter should not be anticipated in the declaration. But the Court of New York in the case of *Freeman v Adams* (9 John R. 115) expressly adjudicated this point. In that case, the plaintiff declared upon an arbitration bond, and the defendant having pleaded that no arbitrament was made within the time, plaintiff replied, that, by a subsequent sealed agreement, the time had been enlarged &c.

The court said, "The case of *Brown v Goodman* is a solemn determination of the K. B. upon the very point, and made after argument upon demurrer. By that decision suit will not lie upon the bond. The party has another

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remedy upon the submission implied in the agreement to enlarge the time.

If this decision be correct in relation to a new agreement under seal, it must apply, a fortiori, to one by parol, and I only refer to it, to show that the Court, in that case, did not for a moment conceive that the cases previously decided had gone on the ground of surprise, but upon the principle that the old agreement was virtually dissolved by the new, and although the new agreement and the old one were of the same dignity, the plaintiff must declare on the new agreement. Whether the decision in *Freeman v Adams* was well supported by authority or not, it goes clearly to shew the opinion, entertained by the New York court, of the grounds on which the case of *Brown v Goodman* and the cases in New York following that opinion, were based. It does not relate to the form of the action, as in the case now at bar, but to the particular contract which must be charged establishing, that the plaintiff must declare upon the new contract, that the new contract, whether under seal or not, is the one for a breach of which he wishes damages—and if the new, contract be under seal, he must of course declare in covenant, and if by parol, he must declare accordingly.

Whatever doubts may be entertained as to the extent to which the authorities both in England and this country have gone on this subject, and as to the weight which these authorities may deserve, it is at least admitted that authority can be found sustaining such a declaration as was demurred to in this action. The case of *Warren v Stagg*, cited in the argument of counsel in *Littler v Holland*, (3 T. R. 581) is the only case which seems at all to countenance the form of action assumed in this case. In that case, if correctly reported, there were no averments of the parol agreement for an extension of the time and justice Buller allowed the parol agreement to be given in evidence. But that opinion is overruled by Lord Kenyon in the case of *Littler v Holland*, where it was cited, and is unsupported by any subsequent decision. Nor would it, if sound law, be entirely apposite to this case, for that was an action of assumption

and the special contract, the breach of which was contained of, was not under seal. AUGUST TERM
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The current of authorities is therefore clearly for sustaining the demurrer, and the principle and reason of the law, I conceive are equally decisive. If it be desirable that the forms of actions should be preserved, and the rules of pleading are, worthy of attention, it is impossible to allow plaintiff to declare in covenant on a contract, an essential part of which is not under seal. It is confounding the well established distinctions between contracts and the actions resulting from these distinctions. It is, in effect, subverting the landmarks by which sealed and unsealed instruments have hitherto been distinguished, and allowing a party to take of equal validity, that which was executed under the solemnity of a sealed writing, and that which was agreed upon in the parol conversation of the contracting parties. judgment affirmed.

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Fisher and
Hanson.

An action of
covenant cannot be sustained on a covenant modified by a subsequent parol agreement.

Judge McGirk Dissenting.

Kirtley and Todd for Plaintiff.

"The plaintiff contends that a covenant, although the time of performance has been enlarged by parol, must nevertheless be sued upon, and such agreement is a sufficient excuse for the non performance of a condition precedent in the case specified in the covenant, if performance or an excuse therefor is alleged under the parol agreement.

No principle is better settled than this.—"A subsequent parol agreement, not contradicting the terms of the original contract but merely in continuance thereof, and in dispensation of the performance of its terms, as in prolongation of the time of execution, is good, even in the case of a contract reduced into writing under the statute of frauds." *Hitt v. Hitt* on Con. 26, 3 T. R. 591, 4 Mo Rep. 41, and 481, 1 C. 22, 2 Condensed Rep. 501, 4 J. Rep. 41, 481.

And it is contended for plaintiff that the same rule holds of contracts under seal, and that there is no legal ground of distinction. See 3, Johns Rep. 528. 2 Call. 5, 125, 9 Pick, 8, 20 John, 462, 8 John 391, and that, in this case, the higher security for the contract being a covenant, the plain-

AUGUST TERM 1839. tiff is bound to sue thereon, 4 Cranch 239, 3 Mo. R. 230-3."

Raymond
vs.
Fleber &
Wanzen,

Rollins and Miller for defendants.

"The only question in this case is whether a completion and delivery on November 15, 1838, can be so substituted for a completion and delivery on November 1, 1838, as to enable the plaintiff to recover upon the article of agreement in the action of covenant.

It is relied on that this cannot be; and to sustain the position thus taken the following authorities are cited; 3 Stark Evi. 1002; Leslie vs Dr. L. Lorre cited in White v Par 12 East 583; Caff vs Penn, 1 M. and S. 27; Davy vs Penn 2 Chit. Rep. 336; Thompson vs Brown, 7 Taunton 6; Blannerhasset vs Pierson (3 Len 234) cited in 7 Taunton 6; Heard vs Wadham 1 East 619; Littler vs Holland 3 T. 390, and Brown vs Goodman in note to same case Freeman vs Adams 9 J. R. 115, Jewell v Schroppel, 4 Cowen 2; Langworth and Clark vs Smith, 2 Mend, 587; Stutiv Miles 2 Marsh, 425. Harrison vs Taylor, 3 Marshall 1; Tydds practice 756; Chitty 116, and 96."

FIRST JUDICIAL DISTRICT.

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HICKMAN VS GRIFFIN.

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1839.

Hickman,
vs,
Griffin,

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Original papers in a proceeding before a J. P. not being duly certified, cannot be read in evidence in the Circuit Court, without some proof of their authority.

Where the J. P. has jurisdiction over the person and subject matter, the warrant though defective, is sufficient to justify the constable.

The general rule, that a party cannot be allowed to make evidence in his own favor, is not departed from in an action for a malicious prosecution, except upon the ground of necessity. If no other person were present when the felony was committed, the evidence which the defendant himself gave, may be read in evidence in this action.

In an action for malicious prosecution the real point of enquiry for the jury is, whether there was probable cause for the prosecution, and not whether the defendant had probable cause to believe the plaintiff guilty, or whether he had probable cause to institute the prosecution.

Where the Circuit Court gives erroneous instructions, the error is not cured by the fact that correct instructions accompanied them, as such erroneous instructions may mislead the jury.

Opinion of court delivered by Napton Judge.

"Griffin sued Hickman for a malicious prosecution before a justice of the peace. The declaration charged that the defendant (below) appeared before one Glazebrook, a justice of the peace in Cole county, and charged him (Griffin) with petty larceny; and procured said justice to issue his warrant; that he caused said Griffin, by virtue of said warrant, to be arrested, and recognised for appearance at the Cole Circuit Court. The declaration further avers the continued prosecution of plaintiff by defendant before the grand jury, and the refusal of said grand jury to find any indictment. The general issue was pleaded, and the parties went to trial.

On the trial, the plaintiff offered in evidence the warrant of the justice, without proving the hand writing of said justice, which the defendant objected to, but the court permitted the writing to go to the jury.

Plaintiff also read the endorsement on the warrant of the return of the constable, without first proving said constable's hand writing. The plaintiff also proved, that the said constable took plaintiff in custody and carried him be-

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fore a magistrate. Plaintiff also gave in evidence the cognizance, which said justice caused him to enter into, and the records of the circuit court of Cole county, reciting the impannelling of the grand jury, their failure to find any bill against Griffith, and the subsequent discharge of Griffith by the court. To the introduction of all this evidence the defendant below objected—but the objection was overruled.

The plaintiff then introduced the justice of the peace, Glazebrook, and proved by him, that the defendant appeared before him, and applied to him for a warrant against Griffin, and that upon his (Hickman's,) application, he (Glazebrook) issued the warrant, being the writing first offered. The defendant proposed to prove, upon the cross examination, said justice, what the defendant swore to before him upon his examination but the court refused to allow the justice to state, what the defendant below had sworn to, the plaintiff having previously proved, that several other witnesses were present at the time the alleged larceny was said to have been committed.

The plaintiff also proved by said justice (Glazebrook) that he (Glazebrook) caused the plaintiff Griffin to enter into a recognizance to appear at the next term of the Cole circuit court and both plaintiff and defendant gave evidence conducing to show the existence or want of probable cause and malice.

At the instance of the plaintiff, the court then gave the jury, the following instruction. "If the jury believe from the evidence, that the defendant prosecuted the plaintiff upon a charge of larceny, and the plaintiff was acquitted and discharged therefrom, and that, the defendant had no probable cause to believe him guilty of the charge, they will find for the plaintiff."

The defendant also asked for the following instructions which were given by the court.

1. That to enable the plaintiff to recover in this cause it is necessary they should be satisfied from the evidence in the cause, that the defendant prosecuted the plaintiff with malice, and without probable cause.

2. That if the defendant had probable cause to institute the prosecution, that then they ought to find a verdict in his favor.

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Griffin.

3. That it matters not how malicious the motive of Hickman was in prosecuting the plaintiff, yet if they believe from the evidence that Hickman had probable cause for prosecuting him, they ought to find a verdict for the defendant Hickman.

4. That the fact that the justice of the peace, Glazebrook, upon the enquiry before him, recognised the plaintiff in a recognizance, binding him to appear at the Cole Circuit Court, to answer over to the charge mentioned in the prosecution, is evidence of there being probable cause for the prosecution, and that the jury ought to find for the defendant on such evidence, unless the plaintiff prove by other evidence that the prosecution was instituted without any probable cause.

5. That it is not necessary in this action that the defendant should show that the plaintiff was absolutely guilty, to entitle Hickman to a verdict, but that it is only necessary that they should believe from the evidence that the defendant Hickman had probable cause to prosecute him Griffin.

7. That it matters not how small the amount of money stolen from the defendant was, the defendant stands justified in the law for prosecuting the plaintiff, if he had probable cause for the prosecution."

The jury found for plaintiff, and defendant moved for a new trial, on the following grounds. 1. The court permitted the plaintiff to give improper testimony. 2. The court refused to permit the defendant to give all and every part of his testimony. 3. The Court misdirected the jury. Which motion was overruled by the Court, and to reverse this judgment the plaintiff in error has relied on the following points, which I will examine seriatim.

First, That the court erred in permitting the warrant of the justice, the return of the constable thereon, and the recognizance for Griffin's appearance, to be read to the jury, without proof of their execution. Second, That the warrant produced did not run in the name of the State of Missouri,

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vs,
Griffin,

Original pa-
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and consequently, the action should have been trespass vi et armis. Third, That the court erred, in not permitting Hickam's testimony before the magistrate, to go the jury. Fourth, That the court erred in giving the instruction asked by plaintiff.

1. If the papers of the justice had been duly certified by him, and it appeared from the record, that they were on file in the circuit court, there could be no question of their admissibility, without further proof. But the papers offered were original papers, and there is nothing preserved in the bill of exceptions to show how they got into the Circuit Court. The papers were not admissible without some proof of their authenticity.

But the plaintiff, immediately after the introduction of this testimony, in his examination in chief proved by the justice of the peace, Glazebrook, the identity and authenticity of the warrant and recognizance, and the fact, that the constable, whose name was endorsed on the warrant, had taken the plaintiff in custody and brought him before him, (the justice) for his examination. Whatever therefore might have been defective in the testimony of the plaintiff when first introduced, he proceeded to supply those deficiencies by competent and full proof, and I do not see any good reason for reversing because of this irregularity. If it could be shewn that defendant was anywise prejudiced by this course, it might constitute a sufficient reason with this court, to aside the judgment. But no such injustice appears.

Where the J.
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The general
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be allowed to
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It is urged that the warrant, not running in the name of the State of Missouri, was not merely voidable, but absolutely void, and that therefore this action should have been trespass. The warrant in this case ran in these words.

"State of Missouri County of Cole, ss," after reciting the inducement, it proceeded "these are therefore to command you to take the body &c." I am not prepared to say whether this would be a valid warrant or not, under the decisions of this court, but this court in the case of Miller v Brown (3 Mo. Rep. 130) at least declared, that such a warrant was sufficient to justify the constable, the magistrate by whom it was issued having jurisdiction over the person

and subject matter. The distinctions between case and trespass, as laid down in many of the books, are so exceedingly refined, that, like, the colours of the rainbow, they run into each other, and would puzzle a man of common sense to make the discrimination. I hold that case was well brought here, and that an action of trespass could not have been sustained against the constable, merely because of this defect in the process which he served.

3. The defendant, on his cross examination of the justice, offered to prove what he had sworn to before him, on the trial of the accused before him (the justice.) This the court very properly excluded. The general rule that a party cannot be allowed to make evidence in his own favor is not departed from in an action of malicious prosecution, except upon the ground of necessity. If no other person were present when the felony was committed, the evidence, which the defendant himself gave, may be read as evidence in this action. *Johnson v Browning* 6 Mo. 216 cited in *Bayard and Peake* 158—311. In that case Hale C. J. allowed what the defendant's wife had testified at the trial of the indictment to be given in evidence on behalf of the husband, when sued for a malicious prosecution, there having been no other person present at the commission of the alleged felony. So also in an action on the statute of Winton, the party robbed was held a competent witness and the author remarks "these are the only cases, I believe, in the books, where parties to the cause have been permitted to give evidence for themselves; and in the latter case, it seems to have been taken for granted, that the party could not be examined, though his former evidence was admitted." *Bayard, and Peake* 151 in note—The diction in Buller cited at the bar (Bullers N. P. 14,) is unsupported by authority, and is contradicted by himself on the next page in which he lays down the rule as established in *Johnson v Browning*. In the case of *Hays v Waller* (2 Mo. Rep. 222) this court perhaps extend the rule, and allow what the defendant swore to on the trial of the indictment, to be read in his defence on his trial for a malicious prosecution, where it appeared that he swore to a fact which no one who was present ex-

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own favor. is not departed from in an action for malicious prosecution, except upon the ground of necessity. If no other person were present when the felony was committed, the evidence which the defendant himself gave, may be read in evidence in this action.

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cept himself borne witness to. Admitting this to be correct, it devolved upon defendant (Plaintiff in error) to shew by the bill of exceptions, that this state of facts existed. Not having done so the judgment of the circuit court on this point must be held correct.

4. The first instruction asked by the plaintiff and given by the court, is open to criticism. Two objections were urged to it, first that the prosecutor's belief of the existence of probable cause is made the test, instead of the existence of probable cause, whether within the knowledge of the prosecutor or not, and second, the jury are not told of the necessity of malice as well as the want of probable cause. The instruction is certainly not sufficiently distinct on this last point, for though malice may be inferred from the want of a probable cause; it is still an essential ingredient in the guilt of the prosecutor, and his liability to the plaintiff. But the subsequent instructions are full and clear on this point and lay down the law with such precision (so far as this point is concerned) that I do not see how the jury could have drawn any inference from the first instruction calculated to prejudice the defendant. The instruction is that if the jury believe from the evidence &c. "that defendant had no probable cause to believe him guilty of the charge, they will find for plaintiff." The true question; as laid down in *Mowry v Miller* (3 Leigh 565) is not whether the defendant had probable cause to believe the plaintiff guilty, but whether there existed a probable cause for the prosecution, no matter whether the defendant knew of its existence or not.

The second instruction given by the court, at the instance of the defendant, is liable to the same objections. "If the defendant had probable cause to institute the prosecution," is the language of this instruction also, and the words "to institute the prosecution," may well be substituted for the words "to believe him guilty." For if the defendant had probable cause to "institute the prosecution," he had probable cause to believe him guilty," and vice versa, whereas the real point of enquiry for the jury was not whether the defendant had probable cause to believe the plaintiff guilty,

In action for
malicious
prosecution
the real point
of enquiry for
the jury is,

or whether he had probable cause to institute the prosecution, but whether *there was probable cause* for the prosecution, thereby referring the jury to the state of facts that existed in relation to the party accused, and not to the knowledge or belief of those facts in the party prosecuting.

Where the court gives erroneous instructions, the error is not cured by the fact that correct instructions accompanied them. *Jones v Talbot* 4 Mo. R. 274. Mere defective instructions may be supplied, but an instruction, which is erroneous in itself, may mislead the jury. For this reason, the judgment of the Circuit Court is reversed and the cause is remanded."

Hayden & Adams for appellant.

"To reverse this judgment the appellant will insist upon the following points and authorities.

1. That the court erred in giving the first instruction asked by plaintiff below.

The warrant of the justice of the peace, the return of the constable thereon, and the recognizance for the plffs. appearance in the Cole Circuit Court to be read without proof of their execution.

See *M'Carty v Sherman* 3 John Rep. 429, 2 Starkie Evi. 812. *Saunders on Pl. and Evi.* 661, side page.

2. The warrant did not run in the name of the State and was therefore void—and the action should have been trespass vi et armis. *Fowler vs Watson* 4 Mo Rep. 27.

3. That the court erred in not permitting the defendant below to introduce in evidence, the testimony he had given before the magistrate upon the original prosecution, see *Hanye Waller* 3 Mo. Rep. 222—*Bullers N. P.* 114.

4. That the court erred in giving the instructions asked by the plaintiff below—see 2, Starkie's Evi. Title Malicious Prosecution, page—See 10th John Rep. 106, *Vanduzor vs Linderman*. See 2 Starkie 911, and note 1, et seq, 3d Leighs Rep. 566."

Todd & Kirtley for appellant.

Although the act of the magistrate in acquitting or sending on for further trial is evidence to shew probable cause or not, it is only prima facie, see 2 *Murphey* 248, 2 John

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Griffin,

whether there was probable cause for the prosecution, and not whether the defendant has probable cause to believe the plaintiff guilty, or whether he had probable cause to institute the prosecution. Where the Circuit Court gives erroneous instructions, the error is not cured by the fact that correct instructions accompanied them, as such erroneous instructions may mislead the jury.

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Griffin,

203, referred to in 2 Starkie 491 note 1, and it may be rebutted by other evidence that the prosecution was without probable cause. 4 Mun. 462 in same note of Starkie, and although defendant may prove a felony committed, and may throw suspicion of the accused, yet it is insufficient in case of express proof that the defendant knew the prosecution was without foundation, 2 Starkie 496.

And no evidence of malice can be more cogent than that the defendant knew that the plaintiff was innocent, 5 Taunt. 583, 2 Starkie 491 note 6.

4. The reason of defendant for a new trial is not true in fact as the record shews all his instructions were given and the 5th has been answered in the answer to first three points."

REED V CIRCUIT COURT OF HOWARD COUNTY.

Under the 41st sect. of 7th Art. of the act regulating "practice and proceedings in criminal cases," (R. C. p. 497,) the owner, and not the temporary master of a Slave convicted in cases therein specified, is the proper person to pay the costs of conviction. The words "owner or master," are most probably synonymous, and mean the owner and not the temporary master.

Application for a mandamus.

Opinion of Court delivered by Napton Judge.

"A slave, the property of Reed, was indicted in the Howard Circuit Court for arson, convicted, and by the judgment of the Court, was ordered to be sent out of the State for 20 years.

Reed moved the court to tax up the costs against Patrick Woods, who had the slave in his possession, when the arson was committed, under a contract of hire for one year.

But the court refused to do so, and Reed now applies for a mandamus on said court, requiring it to shew cause &c.

The costs were taxed under the 41st sec. of the vii. art. of the act regulating practice and proceedings in criminal cases. The section reads, "if a slave shall be convicted of any offence in a case, where, if the convict was a free per-

son, he would be liable to pay costs, such slave shall be sold to satisfy such costs, unless the owner or master appear and pay the same within sixty days after they become due." AUGUST TERM
1839.

It is urged, that the words owner or master in this clause, are not synonymous—and that the bail or temporary owner of the slave should pay the costs in this case. By way of interpreting the intent of the Legislature in using the words "master or owner," counsel have referred to the 35th sec. ix Art. of the Act concerning crimes and their punishments. That section provides that the person injured by the acts of a slave, in specified cases, shall "have an action against the master or owner of such slave *for the time*, to recover any damages &c. not exceeding in amount the value of such slave."

It is obvious, that the last section cited uses the words master and owner in the same sense—The quantum of damages being the value of the slave. The legislature never intended that the bailee of a slave for a year or a month, should be responsible for an amount equal to the value of the slave. The words used in that section "*for the time*," are either superfluous, or most likely were intended to imply, that the action must be brought against the person owning the slave *at the time* the felony is committed—notwithstanding such owner may afterwards part with his interest.

The words in the 41st section are most probably synonymous—but whether so, or not, cannot affect the merits of Mr. Reeds application. If synonymous, they must have meant the owner and not the temporary master, otherwise they would not have ordered the slave to be sold pay the costs.

This would have a gross injustice to the owner, if it were the temporary master's duty to pay them. If the words be not synonymous, then the circuit court had a discretion, and nothing is shown here to satisfy this court, that discretion was not soundly exercised.

"Mandamus refused."

Davis for plaintiff.

"The court refused so to tax the costs and this court is

Reed

vs,
Cir. Ct. of
Howard
County,

Under the 41st sec. of 7th art. of the act regulating "practice and proceedings in criminal cases," (R. C. p. 497,) the owner, and not the temporary master, of a slave convicted in cases therein specified, is the proper person to pay the costs of con-

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vs.
Cir. Ct. of
Howard
County,

now asked for a mandamus on that court, to shew cause,
&c. see Rev. Sta. Crimes and Punishments page 216 sec.
35. See do practice and proceedings in criminal cases article
7, sec. 41 page 497. See also session acts of Legislature of
1836 page 60. Title Crimes."

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BOLTON VS LUNDY.

The notice required to be given by a security to the person having the "right of action," to commence suit against the principal debtor, under the provisions of the 1st sect. of the act "concerning securities," (R. C. p 574) may be given verbally.

Appeal from the Circuit Court of Callaway county.

Opinion of the court delivered by Tompkins Judge.

"Bolton sued Lundy in the Circuit Court, where judgment was given against him, and to reverse the judgment he appeals to this court.

The suit was commenced in the Circuit Court on a note executed by John G. Williams and Richard Lundy to Bolton. On the trial it appeared in evidence, that Lundy gave verbal notice to Bolton to sue Williams, he, Lundy, being security only. It was contended that the notice should have been written. These are the words of the act of 1835 concerning securities sec. 1, page 574. "Any person bound as security for another in any bond, bill or note for the payment of money or delivery of property, may, at any time after an action has accrued thereon, require the person having such right of action forthwith to commence an action against the principal debtor, and all the other parties liable."

One could hardly imagine how an argument could be maintained on this subject, the law being as it is.

But it was contended that as the statutes previously made on this subject both under the Territorial and State Governments required written notice to be served, therefore the Legislature intended that the notice, here required to be served, should also, be in writing, although the act did not in terms require it. I perceive no error in the decision of

The notice
required to be
given by a se-
curity to the
person hav-
ing the "right

the circuit court that a verbal notice is sufficient, such being the opinion of all, it is affirmed." AUGUST TERM
1839.

Leonard for appellee.

"The only question presented by the record is whether under the act of the 16th of March 1835 concerning "securities," (R. S. Mo. 574) a notice to sue, not in writing, is sufficient to discharge a security from his obligation.

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Lundy.

In support of the affirmative of this proposition, it is respectfully submitted to the court on behalf of the appellee that 1st, the words of the statute, to which securities are exclusively indebted for this remedy, do not require the notice to be in writing—The words are unlimited—as comprehensive as they can be "any person bound as security for another in any bond &c. may require the person having the right of action forthwith to commence suit &c." [R. S. Mo. 574.] To demand therefore a written notice, a requirement in writing, is a construction contrary to the plain letter of the act.

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debtor, under
the provisions
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the act "con-
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(R. C. p. 574)
may be given
verbally.

2. And contrary also to the intent of the Legislature, as is manifested in various ways.

1. There are many instances in the revised Statutes of 1835, where the Legislature have required a notice to be given, and wherever it was their intention, that such notice should be in writing, they have so expressly, declared. R. S. M. 357, sec. 9, lb, 220, sec. 6.

2. In the very statute now under consideration, we have two other instances of notices being required, and it being the Legislative intention that, in these cases; the notice should be in writing, they have expressly made this requisition R. L. 575; sect. 9—and 12.

3. The first act on this subject passed in 1816 (Geyers digest, 368 sec. 1) expressly required the notice to be in writing—"may by notice in writing require &c." This phraseology was continued in the law through the revision of 1825 (R. L. M. of 1825 735, sec. 1,) down to the last revision—space of nearly twenty years, when the words "by notice in writing" "were, as it must be presumed, intentionally omitted, with a view to a change of the law on this subject."

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Moore
vs,
Rea,

PORTER & MOORE v REA.

Although it is well settled that the declarations of an assignor of a note, made after the assignment, cannot be admitted to affect the interest of the assignee, yet the assignor himself may be examined.

Opinion of the Court delivered by Napton Judge.

"John Rea, assignee of Horsley Rea, sued Moore and Porter by petition in debt. On the trial of the cause, the plaintiff proved the assignment of the note, and gave the note in evidence to the jury. The defendant, in support of his plea of set off, offered to prove what Horsley Rea, the assignor, had said in a conversation with defendants, subsequently to the assignment of the note—in which he admitted that he owed defendants \$189, and it was still due, but the court refused to allow this evidence to be given. The defendants then introduced Horsley Rea himself, and proposed to prove by him that at the time he assigned said note to John Rea, he, said Horsley Rea, was indebted to defendants in the sum of \$189, for goods &c. The plaintiff also objected to the evidence, and the court sustained the objection.

There was some additional evidence offered and given by defendants to prove the set off, and some rebutting testimony from the plaintiff.

The jury found a verdict for the plaintiff, and defendants applied for a new trial, which the court refused.

The appellants seek to reverse this judgment on the ground that the court erred in excluding the testimony offered of the declarations of H. Rea, and in refusing to allow said Rea himself to testify.

Although it is well settled that the declarations of an assignor of a note, made after the assignment, cannot be admitted to affect the interest of the assignee, yet the assignor himself may be examined.

The principle is well settled that the declarations of an assignor of a note, made after the assignment, cannot be admitted to affect the interest of the assignee—2 Starkie 280, 2 Bibb 470, and Bibb 270—3 Little 14.

But I have heard no reason why the assignor himself may not be examined.

His interest is decidedly against the party calling him. Graham and others v O'Fallon ex'r. 4 Mo. R. 338.

In Whitaker v Brown [8 Wend, 490] where the court excluded evidence of the assignors declarations and admis-

sions; it was upon the ground that the assignor was a competent witness, and being such, the opposite party was entitled to his oath.

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Moore,
vs,
Rea,

In *Hurd v West*, 7 Cowen, 752, [referred to by the court of New York in the same case] it was held, that the declarations of a vendor of personal property, though made before sale, are not evidence against the vendee, but the vendor should be called as a witness.

In *Duckham v Wallis* [5 Esp. N. P. cases 253 cited in 8 Wend 491.] Lord Ellenborough placed the exclusions of such admissions on the same ground—and held, that the assignor himself should be called.

"Judgment reversed and remanded."

Hayden for appellant.

"The appellants will contend that the judgment of the Circuit Court ought to be reversed upon the ground that Horsley was a competent witness, to prove the facts proposed by him, and ought not to have been rejected by the Court below.

See 4th John Rep. 129, *McCleod vs Johnson*, and note [a] and authorities there cited, see 5th Massachusetts reports, *David Webster vs William Levi* 334, et seq. See 2 John R. 394, *Jackson*, on the demise of *Caldwell*, vs *Hallock*. See 7 T. R. 480 *Identon* against *Adkinson*, and note to the case 1. Term Report, 163, *Carter vs Pearse* 4mr.—*Sth Wendells*, Rep. 490 *Whitaker* impleaded &c. vs *Brown*."

Miller for appellee.

"The counsel for appellee, plaintiff below, will insist upon the following points.

1. The court very properly refused to permit the evidence offered by deft. as set forth in bill of exceptions, to the jury.

See 2 Starkie page 41 and note—see page 280 same book, 21 Bibb p. 470—4 Bibb 270 and 290—see 3 Littell 14 page, 8 Wendell 490—3 Johnson 425—20 Johnson 142—3 J. Marshall 627.

2. The Court properly refused a new trial to defts. and not err in overruling their motion for same."

D

DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
SECOND JUDICIAL DISTRICT,

OCTOBER TERM 1839.

GRIFFIN & KINOTE v J. & C. SAMUEL

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55a	317
56a	281
6	50
123	286

1. A bond, signed by a partner in the name of the firm, may be described, in a petition in debt, as the bonds of any one of the partners; our statute permitting the obligee to see as many of the obligors as he thinks proper.
2. The want of service of a writ is cured by appearance and defence.
3. If the Circuit Court, setting as a jury, finds a defective verdict, its judgment will not be reversed in the appellate Court, unless a motion was made in the Court below to arrest the judgment and overruled.

Error to Circuit Court of Monroe County.
Van Arsdall for plaintiff.

1. The writing read in evidence does not appear to be the one sued upon, or that is set forth in the petition.

2. The judgment of the court below is given against Isaac N. Griffin and Henry Kinote, when from the return of the sheriff it appears that the sheriff's summons was only served on Kinote.

3. The note set forth in the petition purports to have been executed by Isaac N. Griffin & Henry Kinote, and the one offered in evidence appears to be executed by J. & I. N. Griffin and Henry Kinote.

Statement of the case made, and opinion of the Court delivered by Napton, Judge.

The defendant in error sued the plaintiff, in error, by OCT. TERM
petition in debt, in the Circuit Court of Monroe County. 839.

The petition is as follows:

Jameson Samuel & Churchill Samuel, formerly partners,
trading under the name and style of Jameson Samuel & Co., plaintiffs, state that they are the legal owners of a
bond, against the defendants, Isaac N. Griffin [signed by said
Griffin by the name and description of I. N. Griffin] and
Henry Kinote which said note was executed to the said
plaintiff by the name and description of Jameson Samuel
& Co., and is to the following effect.

Griffin &
Kinote
vs,
J. & C. Sam-
uel,

Four months after date we or either of us do promise to
pay Jameson Samuel & Co., the sum of four hundred and
seven dollars & 89 cents, for value received bearing ten
percent interest from the date without defalcation or dis-
count, given under our hands and sea's this 7th day of May
1835.

J. & I. N. Griffin IS.

Henry Kinote, IS.

Yet the debts remains unpaid &c.

A summons issued on the above, and the return of the
clerk was that he had executed the writ upon Henry Kinote,
but that Isaac N. Griffin was not found. The record of
the same term states, that defendants came by attorney, and
pleaded their demurrer to this petition, and also their plea,
which demurrer and plea are set forth in so many words in
the record. The demurrer commences "and the said de-
fendants, &c." and proceeds alternately using the singular
and plural without much regard either to legal or gram-
matical accuracy, and is finally signed by counsel as counsel
for defendant and without specifying the name of the defen-
dant. I notice these inaccuracies, because the question
pending in this court has made it material. The plea of non
factum commences also in the plural and is signed
for one defendant only, but does not specify for which de-
fendant. At the second term after the return term of the
plea, the demurrer was withdrawn, and the cause was sub-
mitted to the Court, as a jury, on the issue of non est fac-
tum; and the finding of the Court was that the defendants

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Kinote
vs,
J. and C.
Samuel,

A bond, signed by a partner in the name of the firm, may be described, in a petition in debt, as the bond of any one of the partners; our statute permitting the obligee to sue, as many of the obligors as he thinks proper.
The want of service of a writ is cured by appearance and defence.
If the circuit court, setting as a jury, finds a defective verdict, its judgment will not be reversed in the appellate court, unless a motion was made in the court below to arrest the judgment and overruled.

were indebted to the plaintiff the debt in the petition mentioned, and assessed their damages. Judgment went for the plaintiff. The objections urged in this court to the judgment of the Court below, are first; that the bond offered in evidence materially varied from the bond described in the petition, and secondly; that the court erred in giving judgment against one of the defendants, Isaac N. Griffin, who was not served with process. The first objection is that the parties sued were Isaac N. Griffin and Henry Kinote, and the note offered in evidence is signed by J. & I. N. Griffin and Henry Kinote. Our statute allows the obligee to sue as many of the obligors as he thinks proper [Rev. Co. 1835 p. 459.] There can be no doubt then that Isaac N. Griffin and his partner, who together signed their partnership name of S. & J. N. Griffin, had signed their names separately and in full, the plaintiff could have sued either or both at their option. I do not see how the particular mode of signing by the partnership name can affect this privilege. If a different construction be assumed, the operation of the Statute is avoided so far as partnership notes are concerned. The second objection taken to the judgment of the Circuit Court is that it went against Griffin & Kinote, when it appeared by the return of the sheriff that Kinote only was served. The appearance of the defendants, both by demurrer and plea, is, upon the face of the record, general, though sometimes the word "defendant," and at others the word "defendants," is used; for if a party wishes to appear and plead in such a way as not to commit his fellow defendant; his name must be given. We hold that the appearance in this case cured the want of service.

The verdict in this case, found by the Court setting as a jury, was not responsive to the issue. This might have been taken advantage of by motion in arrest, but there having been no such motion, this Court will not interfere with the judgment of the Circuit Court. Davidson vs Peck, 4 Mo. Rep. p. 438. Judgment affirmed.

SECOND JUDICIAL DISTRICT.

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BYBEE V KINOTE.

607. TERM
1839.

If, upon a review of all the testimony, the Supreme Court shall be of opinion that the Circuit court, in refusing to grant a new trial, improperly exercised its discretion, the judgment will be reversed. **Bybee vs. Kinote,**
Error to Circuit Court of Monroe County.

Van Arsdall for plaintiff insists that, from the testimony preserved in the record of this cause, he should have had a new trial, and further, from the evidence preserved in this cause, it must appear that he is entitled to a new trial, to which he cites, in confirmation thereof, the record from the Court below without further authority.

Napton, Judge.

Bybee sued Kinote before a justice of the peace, where judgment went for the defendant, and upon appeal to the circuit court, judgment having gone again for the defendant, he appeals to this court. The substance of the testimony is preserved in the bill of exceptions, and the only question to this court relates to the proper exercise of the discretion of the Circuit Court in refusing to grant the plaintiff a new trial. All the witnesses on behalf of the plaintiff concur that, about the month of September 1837, Bybee and Kinote were employed together in building a mill, and Bybee, in the presence of the witness, recited a contract which he had made with Kinote for the sale of his interest in the mill, the amount of which was, that Kinote was to pay him one thousand dollars and all expenses, except his own hands and a certain Carlisle who was employed about the work, and that the hands which Bybee had engaged at the mill was himself, two sons, and an old negro man. Joseph Raker, a witness on the part of the defendant, states the contract precisely as the other witnesses, but adds that he understood by the expression of *all the expenses* that it was the expenses accruing about the mill since they had entered into partnership, and was not to include any expenses that had accrued before. The subject matter of the present suit was the cost of some timbers, which had been procured by said Bybee from said Raker previously to the time when Kinote & Bybee had become partners in the erection of the mill. On this evidence, the jury found a ver-

If, upon a review of all the testimony, the Supreme Court shall be of opinion that the Circuit Court, in refusing to grant a new trial, improperly exercised its discretion, the judgment will be reversed.

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Bybee
vs.
Kinote,

dict for defendant, and the court refused to grant the plaintiff a new trial, excluding the inference of Mr. Raker, which was no testimony. There was nothing before the jury, which could justify them in limiting the responsibility of Kinote to such expenses as had accrued about erecting the mill subsequent to a specified time. All the witnesses, including Raker, concur that there was no such limitation, and the language of the contract proved, taken in its ordinary acceptation, would admit of no such construction, but would embrace all the expenses which had accrued in erecting the mill, except the labor of Bybee and his hands. If Raker had within his knowledge any facts or circumstances, which led him to the conclusion he stated to the jury, he should have been made to state those facts; the jury might then have drawn the same inference which he did. There seems to be nothing in the evidence as preserved in the bill of exceptions to justify the verdict of the jury. Judgment is reversed, and the cause remanded.

THE STATE V ACUFF.

Indictment under the 9th sect. of 8th art. of the act concerning crimes and their punishments (R. C. 1835,) for defiling a white female under the age of eighteen years, confided to the care and protection of deft. Held that the statute includes not only guardians but all other persons to whose care or protection any such female shall have been confided, and that the word "of," following the word "or" and preceeding the words "any other person," must be rejected in order to render the section intelligible.

Abernathy for plaintiff; 1st that the act charged is an indictable offence.

2. That if the act charged is indictable, it is sufficiently and properly charged in the indictment.

Authorities cited, in support of first point, Rev. Co. p. 297, 9th sec. article 8th, Mo. Rep. vol. 4th Gordon vs Zumalt, p. 570.

Howell, for defendant. There is no error, 1st. Because said act was intended to embrace the case of guardians only, who had the care and custody of their wards under the age of 18 years, and guardians of lunatics, idiots

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133	457
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145	497

or other kind of wards, except white ones. 2, Because it ^{OCT. TERM} never could have been intended to protect only white fe- ¹⁸³⁹ males under the age of eighteen years, and leave all other Bybee kind of females, who may and have under our laws¹ guar- vs, dians, defenceless and unprotected; and 3, Because the act, Kinote, on which this indictment is intended to be engrafted, cannot be made to embrace the case charged and set out in the indictment without being partly rejected (See Mo. laws p. 207) which will never be done when sense can be made of a statute as it stands; and further because said statute is perfectly sensible and intelligible as it stands, and effect to a very good purpose may be given to every part of it. Other guardians than those of white females under the age of eighteen years may be appointed, (see, title insane persons, Mo. L. 323) all of whom would be unprotected, if the construction be given that is contended for by the State.

Opinion of the Court delivered by Tompkins Judge.

Acuff was indicted in the Circuit Court, and on his motion the indictment was quashed, and, to reverse the judgment of the Circuit Court quashing the indictment, the State prosecutes this writ of error. The judgment charges that Hannah M. Davis was confided to the care and protection of one Grenville P. Acuff by John Davis the father and natural guardian of the said Hannah, she the said Hannah being then &c. a white female under the age of eighteen years &c. The indictment is framed on the 9th section of the 8th article of the act concerning crimes and their punishments, found on page 207 of the digest of 1835. The words of the ninth section are as follow viz: "If any guardian of any white female under the age of eighteen years, or of any other person to whose care or protection any such female shall have been confided, shall defile her by carnally knowing her, he shall, in cases in this act not otherwise provided for, be punished by imprisonment in the penitentiary not less than two years, or be fined not exceeding five hundred dollars, or by both such fine and imprisonment." On the part of the State, the Circuit attorney contends that the word "of," following the word "or" and preceding the words "any other person," in this ninth

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The State
vs.
Acuff,

Indictment
under the 9th
sec. of 8th
art. of the
act concern-
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and their
punishments
(R. C. 1835)
for defiling a
white female
under the age
of eighteen
years, confi-
ded to the
care and pro-
tection of
sec. Held
that the

section ought to be rejected as superfluous, being, as he contends, either a typographical or a mere clerical error, while on the side of the defendant it is contended that the word "of" ought not to be rejected and that under this section of the law none but a guardian appointed agreeably to law can be indicted. The original rolls, from which this act was printed, being lost, we must resort to the usual rules of construing language, in order to ascertain the intention of the law making power. According to the construction contended for by the counsel of the defendant in the Circuit Court, the ninth section should read thus. "If any guardian of any white female under the age of eighteen years or any guardian of any other person to whose care or protection any such female shall have been confided, shall &c." Most certainly this section was framed for the protection of white females under the ages of eighteen years, for the words "any such female," refer as plainly to the proceeding words "females under the age of eighteen years" as language can make them refer, and then the section would be unintelligible. The relative "whose," according to his own construction, relates to the preceding word guardian. To say then that if the guardian of any other person to whose care any such female, meaning a white female under the age of eighteen years of age, shall have been confided, shall defile her by carnally knowing her, he shall &c. be punished &c. would be to say what no one could understand the meaning of; but if, as the Circuit attorney contends, we reject the word "of" it will be perfectly intelligible and the guardian or any other person, to whose care or protection any white female under eighteen years of age may have been confided, will be subject to the penalties of this section if he offend against it. Surely there can be no reason why it is not as criminal and as infamous in several other persons to violate such a trust, as it is for a guardian to do it. The judgment of the Circuit Court is, in my opinion, clearly erroneous and such also being the opinion of all this court, the judgment of that Court is reversed, and

the cause will be remanded to be proceeded in conformably ^{OCT. TERM} to this opinion. 1839.

statute includes not only guardians but all other persons to whose care The State or protection any such female shall have been confided, and that the word "of," following the word "or," and preceding the words "any Acuff, other person," must be rejected in order to render the section intelligible.

LUTES & DULANY v PERKINS Ass'ee.

1. In proceedings under the 10th sec. of 1st art of the act relating to Justices Courts, (R. C. 1835, p. 349) giving justices of the peace jurisdiction out of their own townships in certain cases, it need not appear from the docket of the justice, that the necessity of exercising the jurisdiction existed, but that fact may be given in evidence on the trial of the cause.

2. Whenever it becomes necessary for a justice of the peace to empower a suitable person to execute process, under the 20th sec. of 2d art. of the act relating to Justices Courts (R. C. 1835, p. 352,) the justice is not restricted in his choice to an inhabitant of his own township.

Appeal from a Justices Court deft. appeared in the Circuit court and moved to set aside the judgment of the justice. Held not to be such an appearance and defence as will cure the want of service of the summons, and that the circuit court in such case, (there having been no service of the summons,) erred in entering up judgment against deft.

Error to the Circuit Court of Audrain County.

Van Arsdell for plaintiff. The Court below erred in overruling the motion to dismiss judgment against both the defendants aforesaid, and cites, in support of this position, the statute of the State of Missouri defining and limiting the jurisdiction of justices of the peace in civil cases, revised Statute of 1835, page 348, 1st art. section 7, also same book page 351, sec. 11 and 14, further, same book, page 354, sec. 7, art. 3.

Williams for defendants. The bill of exceptions does not say that the evidence contained in the record was all the evidence given on the trial of the cause, in the Audrain Circuit Court, and there may have been none, for ought this Court knows, see *Foster & Foster vs Nowlin*, May term 1835. *Rollins vs Bowman* 2 vol. Mo. Dec. See also *Carr & Morris vs Simmons* M. Ds. page 59, August term 1837.

1839.

Lutes & Du-
lany,
vs,
Perkins ass'ee

Opinion of the Court delivered by Tompkins Judge. Perkins sued the plaintiffs in error before a justice of the peace and obtained judgment. They appealed to the Circuit Court, and that Court having given the same judgment, the cause comes here by writ of error. The justice of the peace, residing in Wilson Township, directed his process to the constable of Saline township in the said county. On the back of the process issued by the justice was this endorsement, "at the risque and request of the plaintiff I authorise John Perkins to serve and return this writ." This endorsement was signed by the justice, and the return was "that the writ was served on Dulany &c." When the case came into the Circuit Court, the defendants moved that Court to set aside the judgment of the justice for these reasons, viz: 1st the justice had no jurisdiction either of the cause or of the person of the defendant. 2nd The justice had no right to appoint a person out of his township to serve the summons in this cause. 3rd There was no service of the summons before judgment was rendered by the justice. The court overruled the motion to dismiss and allowed the appellee, plaintiff before the justice, to give evidence to show that there was no justice of the peace in Saline township at the time this action was commenced, except the assignee of the note, and that there was no constable in said township; exceptions were taken to this decision of the Court; and it is assigned for error that the motion to dismiss was overruled.

In proceedings under the 10th sec. of 1st art. of the act relating to justices Courts, (R. C. 1835, p. 349) giving justices of the peace jurisdiction to act out of their own township in certain cases, it need not appear from the docket of the justice, that the ne-

1st. Whenever there shall be no justice in the township, where any suit, cognizable before a justice of the peace, ought to be brought, or whenever all the justices of the peace of such township are interested in any such suit, or otherwise disqualified by law for trying the same, every such suit may be brought before some other justice of any adjoining township of the county. See 10th section of 1st article of the act to establish justices courts, &c. page 349 of the digest of 1835. It was contended that it ought to have appeared from the proceedings before the justice that the necessity of applying to a justice, of an adjoining township existed. The statute does not declare it to be necessary to preserve any such evidence on the justices books, and in my opinion

the circuit court committed no error in permitting the evidence to be given before itself.

2nd. I can see no reason why a justice of the peace should be restricted to his own township, when it becomes necessary to empower any suitable person to execute process; the twentieth section of the second article of the above mentioned act requires only that the justice shall be satisfied of the necessity and that the appointment shall be made, at the request and risk of the plaintiff. The circuit court then appears to have committed no error, in refusing to dismiss the suit for this reason.

3rd. The return on the process issued by the justice shows that the summons was served on the defendant Dulany, and not on Lutes. The circuit court then committed error, in entering up judgment against Lutes; for this reason its judgment is reversed, and the cause will be remanded to that court, and it will proceed therein in conformity to this opinion.

act relating to justices courts (R. C. 1835, p. 352,) the justice is not restricted in his choice to an inhabitant of his own township.

Appeal from a justices court, def't appeared in the circuit court and moved to set aside the judgment of the justice. Held not to be such an appearance and defense as will cure the want of service of the summons, and that the circuit court in such case, (there having been no service of the summons,) erred in entering up judgment against defendant.

PEMBERTON V. STAPLES

Fraud constitutes a good defence in law as in equity, and a general allegation of fraud in a plea, without specifying the particulars, is sufficient.

Error to Lewis Circuit Court.

The following opinion was delivered at the August term of the year 1839, and the cause, on motion of the plaintiff in error, being kept under advisement, and the two judges who were then on the bench, being still of opinion that its former judgment was correct, now direct their opinions to be transcribed for publication.

Wright & Anderson for Plaintiff. The circuit court committed palpable and manifest error in sustaining the de-

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cessity of ex-
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Whenever
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vs,
Staples,

murrer of the plaintiff below to the defendants plea of fraud, and the counsel cite, in support of their position, 1 Chitty pl. 553. 1 vol. D. C. L. Montgomery vs Tipton, page 446.

Allen for defendant. There is no error committed by the court below, see 3rd Chitty's pleadings, and precedents and authorities there cited in note p. 963.

Opinion of the court delivered by Edwards Judge.

Staples sued Pemberton by petition in debt in the Lewis circuit court. Pemberton pleaded non est factum and fraud generally. Staples replied to the plea of non est factum, and demurred to the plea of fraud. The court sustained the demurrer and the plaintiff had judgment.

Fraud constitutes a good defence in law as well as in equity, and a general allegation of fraud in a plea without specifying the particulars, is sufficient.

The plaintiff in error insists that the circuit court erred in sustaining the demurrer to the plea of fraud, and cites the case of Montgomery vs. Tipton 1 Mo. Dec. 446. In the case there cited, the court held that fraud constituted a good defence in law as well as in equity, and that a general allegation of fraud, without specifying the particulars, was sufficient. There may have been some conflict in the decisions upon this subject, but we have not the authorities to ascertain how far this extends; 3 Chitty, 963, notes M, & I. As at present advised, there seems to be no objection to the law as settled in the case of Montgomery and Tipton. The other judges concurring, this cause is reversed and remanded.

HUGHES V. OVERTON.

Error to the circuit court of Lewis county.

The following opinion was delivered at the August term of the year 1838, and the case on motion of the plaintiff in error, being kept under advisement, and the two judges who were then on the bench, being still of opinion that its former judgment was correct, now direct their opinion to be transcribed for publication.

Ellison for plff.

1st. The case of Ewing vs. Miller Mo. Rep. A. D. 1822, page 235, plea of fraud is good as well against the assignee

as the obligee of a bond or note. See also statute of 1835, ^{OCT. TERM} page 105, sec. 3. 1839.

2nd. the case of *Montgomery vs. Tipton*, Mo. Rep. A. Hughes D. 1824, page 447; 3rd sec. 1st Chitty 502, margin 4th sec. vs. Overton. also, a late edition of 1st Chitty, page 570; 9th Coke 110-Allen for deft.

There is no error, see the precedents in 3rd Chitty's pleadings, and the authorities there cited in note p. 963.

Edwards Judge.

This case is similar to the case of *Pemberton and Staples* just decided, and must go in the same way. The other judges concurring, the judgment of the circuit court is reversed, and the cause remanded.

DOOLY & KIRKLAND V. JINNINGS.

1. It is the peculiar province of the jury to weigh the evidence and determine its worth.
2. The judgment of the circuit court, in refusing to grant a new trial, will not be reversed by the appellate court, on the ground that the verdict was without evidence, &c. unless the evidence greatly preponderated in favor of the party seeking the reversal.
3. A purchaser at a sale with a knowledge of the defects of the thing purchased, is not entitled to redress unless there has been a warranty.
4. The purchaser of an unsound horse, knowing him to be unsound, must be very particular in the language of a warranty against a known unsoundness, lest the warranty should not be supposed to extend to such known unsoundness.

Appeal from circuit court of Monroe county.

Williams & Kirtly for appellants.

1st. There was no notice, at the time of the sale, that the mare was unsound, 3 Hen. & Mun. *Argentbright vs. Campbell*, p. 144. *Sugden on vendors* p. 315, and *Wildgoose vs. Weyland*, *Gillaspie* 147, p. 67, &c.

2nd. An express warranty need not be in express terms. see 19th Johns 290. 2 Harr and Gill 495. *Wood vs. Smith* 4 Carr and Payne 45. See *Oneida Manufacturing soc. vs. Lawrence*, 4 Con. N. 440. *Jones vs. Bright*, 5 Bingh 533. *Osgood vs. Lewis*, 2 Harr and Gill 495, &c. *Shopman vs. March*, 19th Johns 484. 2nd Starkies Evidence 901, and Chitty on contracts 135.

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3rd. That the seller saying a horse is sound, as far as he knows or believes, amounts to a qualified warranty on which he is liable, see case of Woods vs. Smith 4 Carr and Payne 45. Oneida manufacturing society vs. Lawrence, 4 Cowen 440, 12 Wheat 193.

4th. An offer to return an unsound animal, within a reasonable time after unsoundness is discovered, is sufficient, see 3 Monroe 371. Bibb 91, Bacon vs. Brown. See 1 J. J. Marshall 54. See 4 Little Rep. 16, Tibbs & Clark vs. Timberlake, and Manham vs. Jones, 2 Bibb 33.

Wright for appellee.

No error was committed by the court in giving the instruction asked by appellee.

Opinion of the court delivered by Tompkins Judge.

Jennings assignee, &c., sued Dooley & Kirkland on a note before a justice of the peace; the justice gave judgment against him, and he appealed to the circuit court, where he obtained a judgment, to reverse which the defendants before the justice, appellants here, prosecute this appeal. On the trial of the cause in the circuit court, much conflicting evidence was given. The note was given in consideration of a mare sold by Holmes, the assignor of Jennings, at public auction. The cryer of the sale stated that he declared at the sale that, for any thing known to him, the mare was sound. Several witnesses stated that Holmes had two sorrel mares, one of which they had heard him say was unsound, and that they believed this to be the mare. Several witnesses on the part of the appellant proved that they had known this mare for three or four years, had frequently seen her in use, under the saddle, and also both in the plough and in a wagon, and that they had perceived no evidence of unsoundness; on the contrary, she had performed well. The court then, on application of the appellees, instructed the jury, that if they believed from the evidence that the mare was unsound at the time of the sale, and that Holmes was informed of that unsoundness, then they must find for the appellees. The jury finding a verdict for the appellees, the appellant moved for a new trial, because the verdict was found without evidence, &c., and because the court mista-

structed the jury. It is certainly the peculiar province of the jury to weigh and determine the worth of the evidence, and there was evidence on both sides. That weight of evidence ought to be much the greater, which should determine an appellate court to reverse a judgment, because the circuit court had refused to grant a new trial. In this case, the weight of evidence, as it seems to me, inclined towards the finding of the jury. Therefore its finding should not on that account be disturbed. But it is also insisted that the circuit court mis-instructed the jury. That court did tell the jury, on motion of the appellant, that if they believed from the evidence that the mare was unsound at the time of the sale, and that Holmes was informed of her unsoundness, and that the appellee was also informed of the fact, they ought to find for the appellant, unless they also found there was a warranty of her soundness by Holmes. To this instruction I see no objection. The person who buys at a sale, with a knowledge of the defects of the thing purchased, can certainly pretend to no redress unless there had been a warranty. A person who purchases an unsound horse, knowing him to be unsound, has need to be very particular in the language of a warranty against a known unsoundness; lest the warranty should not be supposed to extend to this known unsoundness. On this account then it does not seem that the judgment of the circuit court ought to be reversed. The judgment is therefore affirmed, this court not perceiving that the circuit court committed error either in refusing a new trial, or in the instructions it gave the jury.

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It is the peculiar province of the jury to weigh the evidence & determine its worth. The judgment of the circuit court, in refusing to grant a new trial, will not be reversed by the appellate court, on the ground that the verdict was without evidence, &c. unless the evidence greatly preponderated in favor of the party seeking the reversal. A purchaser at a sale with a knowledge of the defects of the thing purchased, is not entitled to redress unless there has been a warranty. The purchaser of an unsound horse, knowing him to be unsound, must be very particular in the language of a warranty against a known unsoundness, lest the warranty should not be supposed to extend to such known unsoundness.

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MORTON V. REEDS.

Morton,
vs.
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1. It is error in the court to give an instruction that takes the whole case from the jury.
2. In cases where the proceeding is either summary or *ex-parte*, and especially where the same is in derogation of common right, strict proof is necessary that the requisites of the law have been complied with.
3. The Auditor's certificate required—upon the sales of lands for taxes—to be transmitted to the recorder of the county wherein the real estate is situated, by the provisions of the 11th sec. of act of Jan'y 3rd, 1827, for levying, assessing and collecting state and county taxes, is only evidence of his own acts.
4. Although the certificate of the auditor, that the provisions the law have been complied with, is rendered by the act *prima facie* evidence of the facts contained in such certificate, yet the law relates solely to the acts of the auditor, and to make the certificate even *prima facie* evidence of such facts, it is necessary that it should contain a detailed statement of the performance of the particular duties enjoined by law upon the auditor.
5. Where the certificate merely states in general terms, "that the provisions of the law in such cases made and provided, have been complied with," it is no evidence that the pre-requisites of the law—even so far as relates to the duties of the auditor—have been complied with; indeed such a certificate proves nothing.
6. In the case of lands sold for the non-payment of taxes, the party claiming under the sale must show that all the pre-requisites of the law have been strictly complied with.
7. The general rule, that all public officers are presumed to have done their duty until the contrary appears, is limited and restrained by the rule, that in all summary and *ex-parte* proceedings, the party claiming under them must make strict proof of the performance of every pre-requisite of the law. The former may be the general rule, and the latter the exception, but the former rule never was applicable to cases like the present.
1. Tompkins Judge dissenting; Holding that the Auditor knew officially, by the collectors' return that the land in controversy had been assessed in 1831—that appellants grantor was a non-resident of Lincoln county—that his taxes for that year are unpaid, and that being thus known to be a non-resident of Lincoln county, he could not in legal contemplation, be the owner of any personal property in that county, and if he were such owner the statute nowhere intimates, that the collector is to seek for the personal property of a non-resident to levy on in order to pay taxes due on his land.
2. That the deed of the Auditor to the purchaser of land at a sale for taxes, conveys to the purchaser a title *prima facie* valid.
3. That the Auditors certificates made under the provisions of the 11th section of the act of January 3rd 1827 were in conformity with the law, and that they should have been received as evidence *prima*

facie that every provision of the law preparatory to the sale of the land, and in making that sale, had been complied with; and that it was sufficient for the auditor to state in his certificate in general terms, "that the provisions of the law in such cases made and provided have been complied with."

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That the tax of 37½ cents imposed by the 20th sec. of the act of 3rd Jan. 1831 on each tract of land advertised to be sold for taxes, as an equivalent for the expenses of advertising &c. is constitutional.

That it was not the intention of the legislature that no lands should be sold for taxes at a less price than one dollar and twenty five cents per acre, and the sale of the land in controversy is not void because the whole tract was sold for taxes, it not appearing that any person was willing to pay the taxes for less than the whole tract of land.

That the appellant did not gain any precedence on account of the deed to him for the land in controversy being recorded prior to that of the auditor to appellee's grantor, as the 25th sect. of the revenue law of 1825 provides that there shall be a perpetual lien on all lands sold for taxes, &c.

That the proofs of the correctness of the auditor's proceedings being all matters of record—which the law presumes to be, in this case good *prima facie* evidence—and the plaintiff in the circuit court having offered no evidence to invalidate those proofs, it became the duty of that court to direct the jury to find for the defendant.

Appeal from Lincoln circuit court.

Bates for appellant.

1st. The Auditors sale to Suggett for the non-payment of taxes &c., is illegal and void; because, 1st. The proceeding being by special act, in derogation of common right, the statute itself must be strictly construed against the power. 2d. The proceeding being ex-parte and under a special authority, the greatest strictness is required; nothing can be presumed in favor of the act, but every requisite of the law must be shown to have been complied with, Pit. R. 349-5 and R. 28. 2 Cond. R. 151, and authorities collated, at the end of that case. 4th Cond. R. 395. 19 J. R. 7.

2nd. The certificate of the auditor, under the act of 3rd January 1827, cannot help out the def'ts title, because, 1st. The certificate is not such as the law requires; it states broadly that the requisites of the law have been complied with, whereas it should have stated the facts, and have left the court to judge what the law requires. 2nd. The certificate, if in the best form could only authorize the acts of which the officer had official cognizance, and not acts foreign to his office, as is claimed by the defendant here. U. S. vs.

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Jones adm'r of Ow. 8 Pet. R. 375. 1 Mo. Rep. 537. 2 Bl.
573. Acts of 1826-7, p. 149.

3rd. There is no proof in any part of the proceedings that Paul Chouteau, the former owner of the land, was a non-resident of the county, and if not a non-resident, the auditor had no power to sell. R. Co. 1825, p. 676, § 36.

4th. Assessment for taxation is a necessary pre-requisite. If it exists at all, it must be of record in the county, and is not the subject of proof by the auditor's certificate, yet there is no proof of that fact. Assessor to value property &c. R. C. 1825, p. 667 § 11. To make general assessment lists p. 669, § 17, to be corrected by the court, &c., § 18, 1825.

5th. There is no proof of any legal advertisement of the auditors sale, and 1st. The copy in the record is defective in itself, and there is no proof of its being printed and published. 2nd. There is a total absence of proof that three copies of the advertisement were sent to the sheriff of Lincoln county, and by him set up, as required by the act of 1827, January 1831, § 4.

6th. By the copy of advertisement and certificate of purchase contained in the record, it appears that the auditor sold the land not only for taxes and penalties but for interest and costs which was illegal.

7th. It appears by the record that the land was sold not only for State and County taxes, interest, penalties and costs, but for two additional taxes imposed by the act of 30 January 1827, § 20, which additional taxes were illegal, not being in proportion to the value of the land. See Constitution art. 13th, § 19.

8th. The land could not be sold for the non-payment of taxes, even supposing the owner a non-resident of the county, until there was an ascertained defect of personal property. See R. C. of 1825 § 21, to 28, title Revenue. By the 27 sec. the collector had a general power to distrain goods.

9th. But if no such power to distrain were expressly granted, it is a necessary incident to the power and duty to collect the taxes.

10th. The goods being first liable, the land could not be sold without an official return or statement (and that on the

record) of nulla bona. 2 Cond. R. 151. 5th Cond. R. 28— OCTOBER TERM
4 Pet. R. 366. 1839,

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11th. Supposing all the legal pre-requisites fulfilled, still the whole tract could not be sold but only so much as necessary, R. C. of 1825 Revenue p. 677, § 36—2 Cond. R. 151, and the 17 sec. of same act fixed the minimum rate of assessment at \$1.25 per acre, which bound the State both as legislator and as contracting party. Revised Code 1825, p. 670, 17.

12th. Supposing the auditor's sale formal and regular, still the defendants title deeds are invalid and as against the plff. for want of record. See the date of the recording of the deeds, and R. C. of 1825, p. 674, § 28, same Code, p. 21, § 14.

13th. The instructions asked and refused on part of the plff are covered by the foregoing points.

14th. The instructions given on the part of the def't. are mainly wrong, and 1st. The first instruction leaves to the jury a question purely of law. 2nd. The second and third take from the jury every question of law and fact, and assume the whole case.

Jameson for defendant.

1st. That the power to enact laws for levying, assessing and collecting taxes to support the government necessarily implies the power to prescribe the manner and form by which those taxes shall be coerced, if not paid in conformity to law; and also necessarily implies the power to prescribe what evidence shall be sufficient, and what prima facie sufficient to show a good and valid title in the purchaser of lands sold for taxes due thereon.

2nd. That the land in question was regularly sold according to law, as the property of a non resident. See record and revenue laws.

3rd. That the auditor's certificate is in accordance with the provisions of the law. See the record and also page 49 and 50 of the revenue act of 1826-7.

4th. That if the land is not redeemed in two years from the date of sale, the title vests in purchaser. See digest of

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2nd Pet. Cond. Rep. 151.

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5th. That an officer is presumed to have done his duty until the contrary is proved, 3rd Starkie 1249—Bullers Nisi Prius 298—Viner's abridgement, title Evidence, and Harnden reports, 362.

6th. That the Revenue law in the digest of 1825 gave the selling of non-resident's lands for taxes to the auditor and treasurer, but the act of 1829, page 37, gave it to the auditor alone, (18th Johnson's Reports 441) Revenue laws of 1825 in relation to assessment. Sec. 2, county court to appoint assessor; 3rd to take oath, penalty &c.

Statement of the case made, and opinion of the court delivered by M'Girk, Judge.

Morton the plaintiff brought an action of ejectment against the defendant in the circuit court of Lincoln county to recover possession of a tract of land, lying in that county, containing two thousand arpens. The defendant pleaded not guilty. On the trial, the plaintiff produced a title deed from one Paul Chouteau to himself for the land, and also showed the land had been granted to Chouteau by the Spanish government, and confirmed by the American government. To defeat the plaintiff's right to recover, the defendant sets up title in himself by a deed from one Joseph Suggett to him, and then shows a deed from the auditor of Public Accounts of the State to Suggett, with the certificate of the auditor that the tract of land was sold to Suggett for taxes due the State. There was other evidence in the case and on the trial the defendant had judgment, to reverse which the plaintiff prosecutes his writ of error. I will now proceed to detail the balance of the testimony, and state the points and objections, as they occurred in the circuit court. The land was sold for taxes due for the year 1831. The defendant gave in evidence to support his defence a certificate of Elias Barcroft, Auditor of Public Accounts for the State, in substance as follows, to wit: I do hereby certify that the collector of the county of Lincoln did deliver according to law to said Auditor a list containing the following described tract, lot or parcel of land, lying

said county (then the tract is described) which tract or lot was assessed and taxed in the name of said Paul Chouteau, as a non-resident of said county, for the year 1831, with the sum annexed thereto as a State and county tax due thereon and unpaid, for the year 1831. Signed E. Barcroft, Auditor. The Auditor then charges the amount of the State and county taxes, amounting to about the sum of nine dollars; he also charges thereon as a tax twenty-five cents for the State and twelve and one half cents for the county, as the tax law requires him to do. The certificate then further goes on and says, "and the amount of taxes not having been paid on or before the first day of December 1831, nor were the taxes or interest, accrued thereon since, paid on or before the same was advertised for sale, whereupon the said Auditor did, by advertisement dated on the 10th day of April 1832, advertise, according to law, the aforesaid tract of land for sale to satisfy the taxes, penalties and costs, due and unpaid, to be sold on the 15th day of June 1832 at the door of the Auditor's office; reference being had to the record of the same, at the recorders office of said county of Lincoln, will more fully appear, and that on the 15th day of June, the said State and county taxes, and interest being still unpaid, the said Auditor then charged, in addition to the taxes as assessed, at the rate of 5 per centum per month thereon, from the first day of December 1831, amounting together to the sum herein expressed and costs, and I did thereupon expose to public sale, on the 18th day of June 1832, (continuing the sale from day to day) at the door of said Auditors office, pursuant to law, and the advertisement aforesaid, the following described tract, lot or parcel of land, or so much thereof, as was sufficient to satisfy and pay the taxes, penalties and costs then due and unpaid aforesaid, and did thereon sell the quantity of land or lot, or so much as is hereinafter set forth expressed and designated in words and figures, for said taxes, penalties and costs, to wit, 1701 40-100 acres of land assessed in the name of Paul Chouteau being survey 1744, Township 50, Range 1, W. on Cuiree, amount of taxes, penalties and costs nine dollars and seventy-seven cents: and I do further certify that Joseph R. Suggett, then and

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there became the purchaser of the whole of the above mentioned, described and designated tract, lot or parcel of land, for the aforesaid sum of nine dollars and seventy-seven cents, being the amount of taxes, penalties and costs due thereon, and has paid the same into the State treasury according to law," dated Jefferson City 20th June 1832, and signed by the Auditor, which certificate was filed and recorded by the recorder of Lincoln county, on the 13th of January 1836. The plaintiff also read in evidence a deed from the Auditor for the land, dated 25th June 1834, acknowledged in August 1834, and recorded in the recorders office in Lincoln county, on the 14th of January 1836. This deed was not recorded till after the registry of the deed from Chouteau to the defendant; then comes the deed from Mr. Suggett to Reeds. Then the defendant gave in evidence a copy of an advertisement dated Auditor's office, Jefferson City, April 16th 1832, giving notice that, on the 18th of June following, at the Auditors office, in Jefferson City, certain lands of non-residents as described in a tabular list thereto annexed, would be sold for taxes unless the taxes were paid. It appears that in that list were the lands in question assessed, as the list asserts to Paul Chouteau.—Then the defendant gave in evidence a certified copy, from the Auditors office, of a list of the sales made by the Auditor on the 18th and 19th days of June, containing the tract in question, embracing various tracts of land of non-residents for Lincoln county, which list was recorded in the recorders office for Lincoln county. The copy given in evidence was a copy of this recorded copy, as taken from the recorders office in Lincoln county. Then at the end of the list of sales, the Auditor makes the following certificate (to wit:) "I the undersigned, Auditor of Public Accounts of the State of Missouri, do hereby certify that the foregoing is a true copy of the advertisement of the sale of lands and other property sold to individuals, and to the State of Missouri, in part or in the whole for the taxes assessed, and the penalties and costs thereon, at the door of the Auditor's office in the City of Jefferson, on the 18th and 19th of June 1832, lying and being in the said county of Lincoln; and I do fur-

her certify that the provisions of the law in such cases made and provided have been complied with. Given under my hand and seal, &c , and signed Elias Barcroft, Auditor." The defendant Reeds then gave some verbal testimony of Mr. Watts, who was the Sheriff of Lincoln county during the years 1831-32 and 33, that several times he received from the Auditor printed advertisements of land, that he thinks they were advertisements from the Treasury department of the State of lands sold for taxes, and thinks he set them up in public places in the county, deeming it his duty to do so; one year he set up three such advertisements one of them on a post in the court house, one at Sutton's mill, and one at Auburn; thinks they were of lands sold, because persons often applied to him to know whether their lands had been sold for taxes, and he referred them to that list; they were large printed papers, about the size of the record book, and containing several leaves; he cannot say that he received and set up any such papers relating to the land taxes of 1831; cannot remember the year with any certainty; Barcroft's name was to the papers, and that he having referred to the record book, B pages 288-9, above set forth, he says he thinks one set of the papers received by him contained the same names, and list of lands as in the tabular statement in the record, but contained more. This is substantially about all the testimony given by either party. If however, any more should be remembered, that may be of importance, I will detail it when necessary. The plaintiff asked the court for six instructions, five of which were refused and the other given. The first one refused was as follows, to wit:

1st. The defendant has not shown in evidence any legal title to the premises in any other person than the plaintiff.

2nd. The deed given in evidence by the defendant, purporting to have been made by the Auditor to J. R. Suggett for the land in question did not convey any legal or valid title to the land.

3rd. The land in question could not be lawfully sold for the non-payment of taxes, unless the same had been previ-

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ously regularly assessed for taxation and there is no evidence before the jury of such assessment.

4th. The land in question could not be lawfully sold for the non-payment of taxes unless the sale thereof had been previously advertised publicly according to law, and there is no legal evidence before the jury that the sale thereof was so advertised.

5th. The Auditor of Public Accounts had no lawful authority to sell said land for non-payment of taxes &c., unless Paul Chouteau was a non-resident of Lincoln county, and there is no lawful evidence before the jury of that fact.

The defendant then moved the court for these instructions, as follows:

1st. That if they believe from the evidence that the tract of land in controversy was sold by the Auditor by authority of law for the non-payment of taxes due thereon, and that all the essential requisites of the law had been complied with in making said sale, granting a certificate to the purchaser and in conveying the same to J. R. Suggett, the purchaser at the sale, then they must find for the defendant.

2nd. That the defendant has shown a good legal title in J. R. Suggett, the person under whom he claims the land in question, and that they must therefore find for the defendant.

3rd. That the defendant has shown a better title out of the plaintiff than the plaintiff has shown.

The court then gave these instructions for the defendant. To the refusal to give those asked by him, and the giving the above for the defendant, the plaintiff excepted, and took his bill of exceptions. The jury found a verdict for the defendant, and the court refused to grant a new trial. The cause is brought here by writ of error. The errors assigned by plaintiff's counsel are rather general, but they are that the court refused to give to the jury the instructions asked by the counsel for the plaintiff, and that the court erred in giving the instructions asked for by the defendant. The first position taken by Mr. Bates for the plaintiff is, that the Revenue laws must be construed strictly, and that, in this case, the laws and proceedings being summary and against com-

mon right, must be construed strictly against the power and that in such cases nothing can be presumed, but every requirement of the law must be proved. To support these doctrines, he cites 4 P. R. 349—5 Cond. R. 28—2 Cond. R. 151—4 Cond. R. 395—19 J. R. 7.

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Mr. Jameson answers to this point, that in general the law is, as stated, but that first, in this case, the law has been strictly complied with. Secondly, that an officer of the law is by that law presumed to do his duty till the contrary is proved. 3rd Starkie 1249—Bullers N. P. 298—Viners' abr. title Evidence—Hardins R. 362. Upon this doctrine of the defendants counsel, it is supposable by me, the court predicated the second instruction as numbered in this opinion, among those given for the def't; but on the record it is the third. That instruction asserts that the legal title to the land was shown to be in Suggett, and not in the plaintiff, therefore the jury cannot find for the plaintiff. The instruction asserts that the title is not in the plaintiff, and disposes of the whole case, both law and fact; and for that reason is bad, but as the law, arising on the facts, is fairly before the court, I will proceed to examine the case.

It is error
in the court
to give an in-
struction that
takes the
whole case
from the jury.

The first question is, has the law been pursued in regard to the sale of this land? The plaintiff insists on a strict execution of the law, and strict and legal proof must be made out. This, he says, has not been done. The defendant insists that the law has been duly pursued, and that there is on the record legal proof thereof. I will now pay some attention to the general doctrine invoked by the plaintiff's counsel. I hold it is true that, in *ex parte* and summary proceedings, the law must be strictly pursued, in the case of *McClung vs. Ross*, it was decided by the Supreme Court of the U. S. that under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale and of the deeds made thereon, that every fact necessary to give the court jurisdiction should appear upon the record, 5 Wheatons R. 116. In the case of *Williamson et al vs Peyton's lessee*, 4 Wheat. R. 77, Ch. Justice Marshall delivered the opinion of the court. That was a case where lands were sold for the

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In cases where the proceeding is either summary or *ex parte*, and especially where the same is in derogation of common right, strict proof is necessary that the requisites of the law have been complied with.

non-payment of taxes. In that case, the following points were resolved, first, that in the case of a naked power not coupled with an interest, the law requires that every prerequisite of the law should have been complied with. Second, that the party who sets up title must furnish the necessary evidence to support it. If the validity of a deed depends on acts *in pais*, the party claiming under it, is as much bound to prove the performance of the acts as he would be bound to prove any matter of record on which the validity of the deed might depend. Third, in case of sale for the non-payment of taxes, where land is sold, the Marshalls deed is not even *prima facie* evidence that the pre-requisites required by law have been complied with, but the party claiming under it must shew positively that they have been complied with. There are many other cases cited by the counsel for the plaintiff which go to the same point. The defendant's counsel has cited some decisions from Virginia, which seem to relax this rule, but it appears that the relaxation of the rule depends on legislative enactments of the Virginia legislature. There can be no doubt the legislatures of the several states may make such enactments with regard to the rules of evidence as may suit their views of justice and policy, provided those enactments be constitutional. In Missouri, I take the law to be as laid down in the cases cited by the plaintiff's counsel, that is, that in all cases where the proceeding is either summary or *ex parte* and especially where the same is against common right and against the law, that strict proof is to be required. This principle is in accordance with that declaration of our constitution which declares that no man shall or can be deprived of life, liberty or property without the judgment of his peers or the law of the land; there is no question that peers here means a jury, and the law of the land is the ordinary proceedings in common cases. But as it is conceded that the collection of taxes cannot in general be made by ordinary suits, therefore, of necessity, the proceeding must be summary and *ex parte*. I admit there is force in the necessity, but I insist this necessity begets another necessity, which is, that the execution of the powers and laws relating to the matter shall be strict-

ly pursued, and also strictly proved: otherwise a man may notwithstanding the constitutional inhibition, be deprived of his lands without either the judgment of his peers or the law of the land. For these reasons I conclude the principle invoked by the plaintiffs counsel is sacred in Missouri and I also hold that it applies to this case.

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The next point insisted is whether the revenue laws have been strictly complied with. The main dispute between the respective counsel on this point is about the proof as to the question whether the requisites of the law have or have not been complied with? I cannot now refer to the the exact words of the law regarding the collection of taxes, because the laws cannot now be had. The court have no public library to refer to, and the owners of the law bookshave, for the most part, left Palmyra and closed their offices. I will however speak of these laws as well as I can from memory and the brief before me. The first thing then is that there should be an assessment made, by a person appointed for that business, of all the taxable property in each county; that when that assessment is made, it shall be returned to and corrected by the county court; that there shall be a collector in each county, and that, with regard to non-resident owners of land, he shall make a return of them to the court, and that a list of them shall be made out and sent to the Auditor of Public Accounts; that the Auditor shall advertise all these lands for sale by advertisements, to be printed in some paper printed at or nearest to the seat of government, which publication shall be at least sixty days before the sale, and that the publication shall be continued, &c.; and that the Auditor shall sell the lands of the non-residents on the day appointed unless the taxes be paid; then, when the sale is made, the Auditor shall give the purchaser a certificate of the purchase; that the Auditor shall make out and return to every county where the lands lie, which were sold a tabular statement of the lands sold, to whom sold &c., and certify the same under his hand &c., and that three copies of this statement shall be sent to each county, one of which shall be recorded, and the other two set up by the Sheriff in the most public places. Here let it be remarked

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that the law gives the owner two years to redeem in, and that if, in that time, there is no redemption, the Auditor shall make the purchaser a deed. The law also requires the holder of the certificate of purchase to record his certificate as deeds are recorded. In this case the Auditor has made his first certificate, certifying that the lands were sold, and certifying a copy of his advertisement under which he sold. The law requiring this tabular statement and certificate, after having disposed of this matter, then proceeds to declare that the Auditor shall further certify that the provisions of the law in such cases made and provided have been complied with, which copy of the advertisement so certified and further certified shall be by the recorder recorded in the record of deeds, and a copy of such record, shall be prima facie evidence of the facts contained in such certificate, whenever a sale made under such advertisement shall come in question. See session acts of January 1826, pages 49, 50.

Mr. Jameson counsel for the defendant, insists that this certificate is full and complete evidence that the pre-requisites of the law have been complied with. The plaintiff repels that conclusion. I will in as few words as possible, give my view of the meaning of the law cited, and also will

The Auditor's certificate required—upon the sales of lands for taxes—to be transmitted to the recorder of the county where in the real estate is situated, by the provisions of the 11th sec. of act of Jan. 3rd, 1827, for levying, assessing and collecting state & county taxes, is only evidence of his own acts.

Although the certificate

give my view of the force and effect of the certificate. In the first place let it be remembered that in this case the proceeding to divest the owner of his land for the non-payment of his taxes is both summary and ex parte. Then the proof on the part of the purchaser must be strict. I suppose then that the legislature never intended that the Auditor should be expected or required to certify to more than a witness, under the solemnities of an oath, would be required to swear to, and that is nothing more nor less than what he knows. He can swear to what he has done himself, to what he has heard, seen or felt, but as to that which he does not know by one of his senses, he cannot testify to. Surely beyond this the legislature did not expect the Auditor to go. In this case then he could not know whether Paul Chouteau was a non-resident of Lincoln county; he could not be expected to know that an assessment had been made as the law requires. Both these things, in any given case, he might

know, but he could not possibly know these things in five hundred or a thousand such cases. I then suppose that the meaning of the law is, that his certificate shall be evidence as to his own act, and as to those he must know before he can certify. The law further says the certificate shall be evidence of the facts therein contained. Then the facts must be certified specially. In this case no facts are certified in detail, at least, not all that the law requires to exist before a sale can be made. The facts, that the advertisement was ever printed in a paper printed in or nearest to the seat of government, and sixty days before the sale, are not set forth, though as to these facts, the Auditor might know the truth, and might certify. These are important provisions of the law, the execution of which would constitute facts which the Auditor has not certified as he might have done. My opinion is then that the facts should be detailed, and for the want of that and other reasons the certificate proved nothing, and that for the want of due proof the advertisement and for the want also of proof of due and legal publication, the court erred in instructing the jury, that the defendant was entitled to recover. I am also of opinion that the proof of the execution of legal requirements to be done after the sale is made is defective. First; there is no proof that the Auditor made the three copies required to be made out and sent to the county of Lincoln; there is no proof that the two to be set up by the sheriff were received and set up, and if there is such proof, that there, is no proof that Paul Chouteau's name and lands were in them. These things in these summary ex parte proceedings require strict proof. It is greatly complained by some that, after the lapse of time, in these cases, if strict proof is required, no tax title can be sustained. My answer to this is that though it may be so, yet that is no reason why great and salutary rules of law should be relaxed or broken down, but in such case no tax title ought to hold, unless the law of the land has been complied with, and because it may be difficult, or exceedingly so, to prove it, this is not a good reason why it should be assumed to have been complied with. If any such claimant apprehends the loss of evidence or the death of witnesses, the

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of the auditor, that the provisions of the law have been complied with, is rendered by the act *prima facie* evidence of the facts contained in such certificate, yet the law relates solely to the acts of the auditor, and to make the certificate *prima facie* evidence of such facts, it is necessary that it should contain a detailed statement of the performance of the particular duties enjoined by law upon the auditor.

Where the certificate merely states in general terms, "that the provisions of the law in such cases made and provided, have been complied with," it is no evidence that the prerequisites of the law—even so far as relates to the duties of the auditor—have been compli-

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deed such a
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proves noth-
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In the case
of lands sold
for the non-
payment of
taxes, the par-
ty claiming
under the sale
must show
that all the
pre-requisites
of the law
have been
strictly com-
plied with.

The gener-
al rule, that

all public officers are presumed to have done their duty until the contrary appears, is limited and restrained by the rule, that in all summary and *ex-parte* proceedings, the party claiming under them must make strict proof of the performance of every pre-requisite of the law. The former may be the general rule, and the latter the exception, but the former rule never was applicable to cases like the present.

law has provided ample means by which he may perpetuate any fact in pais material to his case. With regard to the other instructions refused to the plaintiff, and those given to the defendant, a description of them would lead over the same ground already gone over. I will forbear considering them. Before I conclude this case, I will give some attention to one other point made by the defendants counsel which is that all public officers are presumed to have done their duty till the contrary is proved. This position, unless limited and restrained, is directly against the rule, that in all summary and *ex parte* proceedings the party claiming under them must make strict proof of the existence of every thing material, otherwise he takes nothing. The rule invoked by the defendants counsel may be the general rule, and the strict proof rule the exceptions, but the rule never was applied to cases like the present, as far as I can learn. My opinion is that the judgment of the circuit court be reversed and remanded for a new trial.

Dissenting opinion of Tompkins Judge.

Morton brought his action of ejectment against Reeds in the circuit court of Lincoln county. The judgment of that court being given against him he appeals to this.

Morton claims under Paul Chouteau by a deed dated the 17th day of August 1831 conveying the land in controversy to Joseph C. Laville and George Morton, and by a deed from the said Laville dated the 6th day of May 1837 conveying the undivided moiety of the said land to the said Morton.

The deed from Chouteau to Laville and Morton was recorded on the 29th day of September 1835, that from Laville to Morton on the 10th day of July 1837. It was admitted that Morton the plaintiff had all the title to the said land which Chouteau had on the 17th day of August 1831, except such title as was conveyed to Joseph R. Suggett by the deed of the Auditor of Public Accounts, and the other

proceedings hereinafter stated, as given in evidence by the defendant. The defendant also admitted the possession in himself of the land in controversy. The defendant on his part gave in evidence 1st. the following certificate of the Auditor of Public Accounts, viz: I Elias Barcroft Auditor of Public Accounts of the State of Missouri, do hereby certify that the collector of the county of Lincoln did deliver according to law to said Auditor a list containing the following described tract, lot or parcel of ground as lying and being in the county of Lincoln aforesaid, which tract of land was assessed and taxed in the name of the person herereinafter expressed as a non-resident of said county for the year 1831 with the sum annexed thereto, as a state and county tax due upon said land, or lot, and unpaid for the year aforesaid, and the said Auditor thereupon charged the same with the aforesaid state and county tax, and the amount of the tax not having been paid on or before the first day of December 1831, nor were the taxes and interest accrued thereon since paid as required by law before the same was advertised for sale, whereupon the said Auditor did by advertisement dated the 10th day of April 1832, advertise according to law the aforesaid tract, lot or parcel of land for sale to satisfy the taxes penalties and costs so due and unpaid to be sold on the 15th day of June 1832 at the door of the said Auditor's office, reference being had to the record of the same, at the recorder's office of the said county of Lincoln will more fully and large appear; upon the said 15th day of June the said State and county taxes and interest being still due and unpaid, the said Auditor then charged in addition to the taxes assessed at the rate of five per centum per month thereon from the said 1st day of December 1831, and costs amounting together to the sum also hereinafter set forth and expressed, and did thereupon expose to public sale on the 18th day of June 1832 continuing the sale from day to day at the door of the said Auditor's office pursuant to law and the advertisement of record aforesaid the following described tract, lot or parcel of land, or so much thereof as was sufficient to satisfy and pay the taxes, penalties and costs then due and unpaid as aforesaid, and did thereupon sell the

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quantity of land, or lot, or so much as hereinafter set forth and expressed and designated in words and figures for said taxes, penalties and costs, to wit: 1701 40-100 acres of land assessed in the name of Paul Chouteau being survey No. 1744, Township 50, Range No. 1, West on Cuivre, amount of taxes, penalties and costs nine dollars ninety-seven cents. I do further certify that Joseph R. Suggett then and there became the purchaser of the whole of the above mentioned, described and designated tract lot or parcel of land for the aforesaid sum of nine dollars and ninety-seven cents being the amount of the taxes, penalties and costs due thereon, and has paid the same into the treasury according to law.— Given under, &c.

Auditor's fees paid by Joseph R. Suggett. 25 cents, signed, &c.

This certificate was filed for record and recorded on 30th January 1836 by the recorder of Lincoln county.

2nd. A deed from the Auditor of Public Accounts in the usual form, dated 20th July 1834, recorded in the office of the recorder of Lincoln county on the 14th day of January 1834.

It was admitted by the plaintiff that whatever title passed to the said Suggett by the said deed of the Auditor to him, was passed to and vested in him the said defendant Reeds by deed from Suggett before the commencement of this suit.

3rd. The record of the advertisement and certificate of Elias Barcroft Auditor of Public Accounts, as the same is recorded in the recorder's office of Lincoln county, &c., as follows:

Notice is hereby given to all persons whom it may concern, that unless the taxes and the interest thereon at the rate of fifteen per centum per year which may become due on the following described real estate assessed and taxed as belonging to non-residents shall be paid into the state treasury on or before the 15th day of June 1832, the property thus described will then be sold at the door of the Auditor's office in the City of Jefferson, or so much of each tract of land, or lot of ground will be sold as will satisfy the taxes,

interest and penalty of five per centum per month to be computed from the 1st day of December 1831, as may then have accrued with an additional tax of thirty seven and a half cents as an equivalent for the costs or expenses of advertising &c. on each tract of land or lot of ground as may then remain unpaid of the following lists of lands and lots situated &c.

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Here follows a tabular list of the lands advertised to be sold, which lie in Lincoln county, of which the tract in dispute is one. Then follows the certificate, viz: I, the undersigned Auditor of Public Accounts of the State of Missouri do hereby certify that the foregoing is a true copy of the advertisement of sale of lands and other property sold to individuals and to the State of Missouri at the door of the Auditor's office in the City of Jefferson on the 16th, 18th and 19th days of June 1832, lying and being in the said county of Lincoln. And I do further certify, that the provisions of the law in such cases made and provided, have been complied with.

4. The verbal testimony of Henry Watts. This witness stated that he acted as sheriff of Lincoln county for four years including the years 1831, 32 and 33; that several times he received from the Auditor, printed advertisements of land while he was such sheriff; thinks they were advertisements from the Treasury department of the State of lands sold for taxes; he thinks he set them up in public places of the county deeming it his duty to do so; one year he set up three such advertisements, one of them on a post in the court house, one at Sutton's Mill, and one at Auburn; he thinks they were of lands sold, because persons often applied to him to know if their lands had been sold for taxes, and he referred them to that list to ascertain. They were large printed papers about the size of the recorder's book, and containing several leaves; he cannot say that he received or set up any such papers relating to the year 1831; cannot remember the year with any certainty. Having referred to the record of the advertisement in the record book above set forth, he says he thinks one set of the papers received by him contained the same names, and lists of lands

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as are found in the tabular statement of the said record but contained more. No other testimony was given.

The plaintiff then moved the court to give the jury these following instructions, and they were refused.

1st. The defendant has not shown in evidence any legal title to the premises in any person other than the plaintiff.

2nd. The deed, given in evidence and purporting to have been made by the Auditor of Public Accounts to Joseph R. Suggett for the land in question did not convey any legal or valid title to the said land.

3rd. The land in question could not be lawfully sold for the non-payment of taxes, unless the same had been previously regularly assessed for taxation, and there is no evidence before the jury of such assessment.

4th. The land in question could not be lawfully sold for the non-payment of taxes and for penalties and costs unless the sale thereof had been previously advertised publicly according to law, and there is no lawful evidence before the jury that the sale thereof was so advertised.

5th. The Auditor of Public Accounts had no lawful authority to sell said land for non-payment of taxes, penalties and costs unless Paul Chouteau was a non-resident of Lincoln county, and there is no lawful evidence before the jury that said Paul Chouteau was a non-resident of said county.

On motion of the defendant the court gave the following instructions, viz:

1st. If the jury believed from the evidence that the tract of land in controversy was sold by the Auditor by authority of law for the non-payment of taxes due thereon and that all the essential requisites of the law had been complied with in making said sale, granting a certificate to the purchaser and in conveying the land to Joseph R. Suggett the purchaser at the sale, under whom the defendant claims, then they must find for the defendant.

2nd. That the defendant has shown a better title out than the plaintiff has shown.

3rd. That the defendant has shewn a good legal title to Joseph R. Suggett, the person under whom he claims,

the tract of land in controversy, and that they must therefore find for the defendant.

The instructions asked by the defendant were given and as above mentioned those asked by the plaintiff were refused, and the plaintiff excepted to the giving of the instructions for the defendant, and the refusing of those asked by himself.

The appellant's counsel admits that the case turns entirely on the validity of the tax title, and that all the points arising out of that title are embraced in these instructions, asked by the plaintiff, and as above mentioned refused, and in those asked by the defendant which were given.

For Morton the appellant it is insisted "that the sale to Suggett, as evidence on the record, is illegal and void; that the proceeding is by special statute in derogation of the common law and common right, and therefore the act itself must be strictly pursued, and every requirement of the law strictly enforced against those who claim authority to strip a man of his private property; that this is a plain common law principle in accordance with our bill of rights which declares that no man shall be deprived of his life, liberty, or property, but by the judgment of his peers, or the laws of the land; that the books abound with cases in full confirmation of this principle. In Ronkendorf vs Taylor's lessee the Supreme Court of the United States say, in ex parte proceedings under a special authority great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in favor of a collector who sells real estate for taxes, to cover any radical defect in his proceedings; and the proof of the regularity of the proceedings devolves upon the person, who claims under the collector's sale. That this is the uniform spirit of the decisions of the Supreme Court of the United States from the earliest to the latest cases; that a strong case in point is Stead's ex'rs vs. Course; that the appellee relies upon the 11th section of the act of January 1827 which provides that the Auditor shall transmit, to the recorder of the county, a copy of the

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'advertisement of sale certifying that the provisions of the
'law in such cases made and provided have been complied
'with, and that a copy of such record shall be prima facie
'evidence of the facts contained in such certificates, whenever
'a sale under such advertisement shall come in question; that
'the defendant in the circuit court relied upon this provision
'as covering all apparent defects, and superseding the neces-
'sity of complying with the particular requisitions of the law
'and that the circuit court, sustaining that view, instructed
'the jury accordingly, which, it is insisted, is entirely wrong.
'1st. Because the Auditor has not pursued the law, and the
'record does not shew the required certificates. 2nd. The
'act does not make the certificates evidence of opinions, in-
'ferences and matters of law, but only prima facie evidence
'of the facts contained in such certificates; to make the cer-
'tificates evidence they ought to recite the facts required by
'law; to say only that the requisitions of the law have been
'complied with, is to usurp the judicial function, and to
'give an authoritative opinion, instead of reporting the facts
'to those who have a right to judge, and this, it is said, no
'ministerial officer can do; that a sheriff cannot return that
'he has executed a writ according to law; he must show
'how. 3rd. It is urged that respect for the legislature for-
'bids the supposition, that the act designs to make the Audi-
'tor's certificates evidence of things not officially known to
'him, and of which his office did not contain the best evi-
'dence; that it would be an absurdity in logic and oppres-
'sive in fact; that the proceedings to a sale of land for taxes
'are in the nature of a proceeding at law; they constitute
'a special authority which must be strictly pursued, that any
'defect in any link of the chain is fatal; that assessment for
'taxation is an indispensable pre-requisite; yet it does not
'appear on the Auditor's proceedings that any assessment
'was made; that if there were any assessment at all the
'proof of that fact must appear in Lincoln; that advertise-
'ment for sale is no less necessary, yet there is no lawful
'proof of it; that the statement of the Auditor in his certifi-
'cate of sale, that he advertised according to law is no proof
'of it, he being a mere executive officer and not a proper

judge of what is, or is not according to law. He says that this advertisement is dated the 10th day of April 1832, but does not state that it was ever printed, or if printed, when or where or in what paper; that the act of 1825 section 36, p. 617 requires advertisement in some newspaper at or nearest to the seat of government, and that the sale shall be at least sixty days after publication and not after the date of the notice, for taxes and the penalty thereon, and not for costs as in this instance; that to insure a better publication of the advertisement for sale, the act of the 18th of January 1831 section 4, p. 72, in addition to the Auditor's former duties required him to transmit to the sheriff of each county three copies of the advertisement which the sheriff was to set up in his county; that there is no legal evidence of a compliance with this law; that if it should be said that the Auditor's certificate is proper proof that he sent the advertisements to the sheriff, it surely is not proof of what he did with them; that when the Auditor undertakes to jumble together in one lump, state and county taxes, penalties, and costs, he commits an abuse calculated to hide his own errors, so as to render detection very difficult, and enable him unquestioned to increase his own emoluments by multiplying tax sales, and to keep the interested in the dark as to the facts on which the sales depend; that no law can be found to authorise the Auditor to charge costs against the owners of lands sold for taxes; that the 20th section of the act of 3rd January 1827 requires the Auditor to add 25 cents as a tax and 12½ cents as an additional tax on all lands listed for advertisement after the 20th day of January in each year; that it does not appear that this tract is one of that class, and if it were thus subject to "three bits" additional tax, it is not subject to the Auditor's arbitrary taxation of costs; besides that the two taxes imposed by the last reviewed section are unconstitutional, the constitution declaring that all property subject to taxation in this state, shall be taxed in proportion to its value; that unless Paul Chouteau was a non-resident of the county, the Auditor had no power to sell the land, whatever might be due upon it for state and county taxes; or the Auditor or printer for

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'costs, that the fact of non-residence is not affirmed in the
'all concealing cloak of the Auditor's certificate; he states
'only that the collector sent him a list importing the non-re-
'sidence of Chouteau and that the land was taxed to him;
'that fortunately for the cause of truth and justice there
'was no act of the assembly making the list of the collector
'even prima facie evidence of the facts contained in it.—
'It was moreover contended that the land could not be sold
'before the personal property was exhausted, and that it
'does not appear that there was none; and that the whole
'tract was sold when the law allows only so much to be sold
'as would be sufficient to pay the taxes; that the statutory
'value of land is fixed by the act providing that none shall
'be assessed at less than \$1,25 per acre, and it is therefore
'insisted that more should not have been sold, than would
'have been sufficient to pay the taxes at that price. Stead's
'ex'rs vs. Course is relied on. See 4 Cranch 402."

The defendant in the Circuit Court, appellee here, con-
tends that "the Auditor's certificate is evidence prima facie
that the every act, required previous to the sale, is done:
but if it should be thought that this last act of setting up
the advertisements of sale by the sheriff ought to be proved
by other testimony, that the testimony of Watts the sheriff
of Lincoln county in 1831 is sufficient to establish that
fact."

The following are the points, which appear to me material to a correct decision of this cause. 1st. Whether the Auditor possessed officially information that the land in controversy had been assessed, that Paul Chouteau was a non-resident of Lincoln county, and that the taxes were unpaid, and whether the act requires that he should be officially informed that there was no personal property of Paul Chouteau in Lincoln county.

2nd. What evidence is the Auditor's deed to the purchaser at the sale for taxes?

3rd. Whether the several certificates of the Auditor are made conformably to law, and if so made, what is their legal effect.

4th. Whether the tax of 37½ cents imposed by the 20th

section of the act of 3rd January 1831 is constitutional, and whether there be evidence that this tract of land is of the class designated by that section of the act.

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5th. Whether the legislature intended that so much only of the land should be sold as would be sufficient to pay the taxes at one dollar and twenty-five cents per acre, and that the sale should be void because the whole tract was sold.

6th. Did Laville and Morton acquire any precedence, because Chouteau's deed to them was recorded before that of the Auditor to Suggett was recorded?

1st. The act of 1825 to provide for levying, &c., State and county taxes prescribes the duty of the assessor in office in 1831; and for the taxes of that year the land in controversy was sold. By that act the assessor is required to make out, for the use of the county court, two lists of the taxable property of his county, one of which shall exhibit in alphabetical order, the names of all persons, liable to pay taxes, residing within the county, the other shall exhibit in like order the names of all persons residing without the county who own property within &c. See section 17, p. 569 of the digest of 1825.

The act of 3rd January 1827 directs the several county courts so soon as all appeals shall have been determined, and the assessors lists corrected, to cause their clerk to make out, from the corrected assessment lists, two lists each exhibiting, in alphabetical order, the names of all persons resident of the county liable to pay taxes thereon; also in like order two lists containing the names of all persons not resident of the county, who are liable to pay taxes therein, with the enumeration, description and valuation therein contained, and assessments thereon for State and county purposes, the former to be called the resident tax list, the latter the non-resident tax list, which lists shall be verified by the clerk under his seal of office, one of which shall be delivered to the collector of the county &c., and the other shall remain in the office of such clerk, and at the same time the clerk is required to certify to the Auditor of Public Accounts the amount of the per centum which the county court has ordered to be assessed on the amount of State taxes for the use of the

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county, together with a list of all the real property subject to taxation, and a complete aggregate statement of the whole list with the collector's receipt thereto, &c. See sec. 6 of the above act p. 48.

The same act of 1825 above mentioned makes it the duty of the collector of each county, on or before the first Monday in December in each year, to deliver to the Auditor of Public Accounts a complete list of the names of all persons residing out of his county liable to pay taxes therein with a description, valuation and assessment of the property taxed, and of the the amount of State and county taxes due thereon, and remaining unpaid, and this list to be verified by oath or affirmation. Sec 32nd section of the act p. 676.

Thus we find that the Auditor has before him, officially, the best information that Paul Chouteau was in 1831 a non-resident of Lincoln county, that his property was assessed, and that on the first Monday in December 1831 his taxes were unpaid. For unless property had been assessed the collector could not have reported his taxes unpaid, and that he was a non-resident. In pursuance of a duty expressly enjoined on him by an act of the General Assembly of the State of Missouri the clerk of the county court of Lincoln county made out from the lists of the assessor corrected by the court of appeals, two lists of taxable property, one of which was given to the collector by which he was informed that this land was assessed to Paul Chouteau a non-resident; the collector again in pursuance of a duty expressly enjoined on him by law, delivers to the Auditor his list, showing that this Paul Chouteau is still a non-resident, and that his taxes are unpaid. Had the defendant produced in evidence the corrected list deposited in the office of the clerk of the county court, it would have been evidence of assessment because it was made out by an officer in pursuance of a duty expressly enjoined on him by law; but the collector being furnished with a list of equal authority, delivers his list to the Auditor, not under the obligation of the official oath only, but also under the obligation of a special oath "where an officer," says Judge McClean delivering the opinion of the Supreme Court of the United States in

this same case of Ronkendorf vs. Taylor's lessee, "does an act in pursuance of a duty expressly enjoined on him by law, this not only makes that act evidence, but the best evidence." See the case 4th Peters 360.

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As that case was so much relied on by the counsel for the appellant, I will advert to it more particularly than he has. The action was brought by Taylors lessee against Ronkendorf who claimed under a collector's sale and deed. The collector in that case was furnished with what they called a tax book made out by an officer, called a register, from the original assessment lists corrected by a court of appeals.—The register there acted under the authority of the corporation, as the clerk here acted under the authority of the county court. On the trial of the cause Ronkendorf offered in evidence, to prove the assessment, by the tax book of the collector. The counsel there, bolder than the counsel here, contended not only that the tax book was no evidence, but they also contended that it ought to be shown that the assessor was regularly and lawfully appointed, and that the original assessment lists ought to be produced to show that the property had been assessed. Those two points were considered together by the Judge, and previously to overruling them he declared the rule which the appellants counsel relies on so much that he connects it, in his quotation, with our bill of rights. In considering those two points Judge McClean says. "But it was contended that the original lists of the assessment must be produced and also proof of the appointment of the assessors. The court recognize the principle contended for by the counsel for the plaintiffs in error, that in an ex parte proceeding of this kind, under a special authority great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector, who sells real estate for taxes, to cover any radical defect in his proceedings, and the proof of regularity in the procedure devolves upon the person who claims under the collector's sale." Recognizing then the principle the Judge proceeds to deliver the opinion of the court by

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which both the points were over-ruled, the court deciding that the corporation existing under the authority of a public law, of which all were bound to take notice, and the assessors acting under the authority of that corporation, that was the best evidence of their appointment, and that the assessor's list, till corrected by the court of appeals, would not have been evidence, but that the tax book was the only and best evidence, because made out by an officer in pursuance of a duty expressly enjoined on him by law. For the same reason the complete list of our non-resident land holders, delivered on or before the first Monday in December 1831 to the Auditor was evidence, and the best evidence that could have been given to him of the assessment of the of the land, of the non-residence of Chouteau, and of the non-payment of the taxes; for he might have paid them to the collector himself at any time before the delivery of the collectors list to the Auditor, or he might since the assessment become a resident. But it was contended that, by the act of 1825 so often before cited, the collector is bound to exhaust personal property, and that it must appear to the Auditor that there are no goods before he can sell, and that such proof ought to have been made before the circuit court. The 27th section of that act, which is here relied on by the counsel for the appellant, has reference to the taxes of those individuals only who reside in the county. By it the collector is directed to apply once at the dwelling house, and if the taxes are not then paid, or within ten days thereafter, he shall proceed to collect by distress and sale of goods; and by the 28th section he is directed to sell the lands where no goods can be found.

In contemplation of law all taxable personal property, lying and being within a county has an owner in that county for the purpose of paying taxes. The 4th section of the act of 1825, to provide for levying, &c. State and county taxes, requires the assessor to proceed through every part of his county, and to require all persons owning, possessing, or having the care, or management of property, taxable by law lying and being in the county to deliver to him written lists of the same, and by that section it is made their duty

to deliver a list of all they so had on the first day of January of that year. Possession is the most common and notorious index of the ownership of personal property. It would have been very hard for the law to require the collector of Lincoln county to know that Paul Chouteau owned personal property in that county, and to be able to distinguish that property from the personal property of another man, when the said Chouteau, for any thing appearing in this record, might have been residing among the Osage Indians, in St. Louis, or in the City of New Orleans. He might have paid his taxes to the collector under the provisions of the 32 section of the act of 1825, or to the State treasurer under those of the 33rd section of the same act. If he had paid to the collector, his representative the appellant might have proved it by the receipt; if to the State treasurer, the Auditor's quietus might have been produced. The Auditor then knew officially by the collector's return that the land of Paul Chouteau had been assessed in 1831; and also by the same return he knew officially that Paul Choateau was non-resident of Lincoln county and that his taxes for that year were unpaid; and finally Paul Chouteau, being thus known to be non-resident of Lincoln county, could not in legal contemplation be the owner of any personal property in that county, and if he were such owner, the statute nowhere insinuates that the collector is to look out for the personal property of a non-resident to levy on to raise money to pay taxes due on his land.

2nd. The next inquiry is, what evidence of title is the deed made by the Auditor to the purchaser of the land at the sale for taxes. To use again the language of Judge McClean in the same case of Ronkendorf vs. Taylor's lessee. The sale of this land was made by the Auditor and the deed executed to the purchaser by this officer "in pursuance of a duty expressly enjoined on him by law." This officer too is a person deriving no emolument from the money produced by the sales of the lands of non-residents; all his acts are matters of record, and they too are performed at the seat of government on due notice given at a time too when it is expected that numbers will be present from every sec-

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Judge dissenting; Holding that the Auditor knew officially, by the collectors return, that the land in controversy had been assessed in 1831—that appellants grantor was a non-resident of Lincoln county—that his taxes for that year are unpaid, & that being thus known to be a non-resident of Lincoln co., he could not be the owner of any personal property in that county, and if he were such owner the statute nowhere intimates, that the collector is to seek for

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the personal
property of a
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to levy on in
order to pay
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his land.

tion of the State to attend the sales. This makes the deed evidence. The common law adopted by our statute presumes that every officer performs his duty until the contrary be proved; and the benefit of this presumption shall extend not to the officer only, but to all those who derive their claim to property through his official acts. The chief justice of the court of appeals of the State of Kentucky delivering the opinion of that court in the case of *Hickman vs. Boffman*, says: "It is a principle of law well settled, that 'every officer acting under the sanction of an oath, or in whom the government reposes a trust, shall be presumed to have done his duty till the contrary be proved.'" This is a principle of the first necessity in society, and indispensable to the rights of those who by law are obliged to commit their rights to the management of others. The law reposes a special trust in the officer, and the citizen is obliged to trust him. Precarious and perplexing indeed would be the situation of the citizen if he were obliged to prove that the officer had done his duty; or if the presumption of his having done it were not to be indulged till the contrary be proved. The principle is equally applicable to a proceeding against an officer, and to a proceeding against the right of an individual derived through the acts of that officer. It was the duty of the officer intrusted by the government, not issue a grant in this case without the warrant having been lodged with the plat and certificate. He having issued the grant, we must presume that he had the warrant to authorise the grant till the contrary be proved. See the case in *Hardins* reports page 348. In this case the register who had issued the grant for the land, had no recollection that the warrant had been previously lodged with him, and had certified that he had not discovered, from an examination of the survey, that the warrant had accompanied it.

Here is a palpable defect of a warrant, by the authority of which the defendant *Hickman* claimed the right to survey 2200 acres of land, and to demand from the state a patent for the same; the plaintiff in the inferior court claims by right of pre-emption, a right good in itself; but the title of *Hickman* was the elder of the two, and the court of ap-

peals decided that his title was good notwithstanding it did not appear that a warrant was filed with the register; for that officer having issued the grant, they would presume that a warrant had been deposited to authorise the issue.— But in the case now under the consideration of this court, no defect in any proceeding from the assessor to the Auditor has been attempted to be shown. For much better reason then it ought to be presumed that the Auditor has done his duty, and consequently that the deed made by him to the purchaser is valid.

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In assuming that the Auditor's deed to Suggett, is *prima facie* good evidence of title in his alienee, I feel myself sustained not only by that general rule of law so well illustrated in the two cases last above cited, *viz*: Hickman vs. Boffman and Ronkendorf vs. Taylor's lessee, but also, by a decision of the court of appeals of the State of Kentucky, which is directly in point. That case is Allen vs. Robinson 3 Bibb 326. The action was ejectment brought by Robinson vs. Allen &c. for land which Allen claimed under a sale and conveyance made by the register of the land office for the non-payment of taxes. In the course of the trial Robinson offered evidence to avoid the register's deed which the inferior court rejected. Allen took the case up on some point decided against him. The court of appeals reversed the decision on the point made by Allen; and the whole of the evidence in the case being made a part of the record, they say, "But as a new trial must be awarded, it becomes necessary to decide whether or not the circuit court decided correctly in rejecting the evidence of William Hunter, which was offered by the plaintiff in that court."

"The sale and conveyance of the register when legally made pass to the purchaser the legal title; and, in a contest involving the validity of such sale, the register's deed (as he is an officer presumed to have done his duty) should be taken as *prima facie* evidence of the requisitions of the law having been fulfilled. But as the register derives his authority to sell land for the non-payment of taxes from the law, to make his deed effectual to pass the title, that authority must be strictly pursued, and although the deed will pri-

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'ma facie prove the correct exercise of the authority, it may be repelled by making proof that the law was not regularly pursued in making the sale."

"As therefore the plaintiff in the court below could avoid the effect of the register's deed by proof of the sale having been illegally made, it results that the evidence offered by him in that court, but which was rejected, if it tended to prove such illegality, ought to have been admitted. That the evidence tended to such proof we think evident. The law requires that the register should advertise the time and place of sale for three months, twice in each month successively, in the gazette of the public printer. The obvious meaning of this provision of the statute requires, that the time and place of sale should be advertised at least three months before the sale. The evidence which was rejected should have been received, as it tended to prove that the register did not advertise the time of sale for three months as the law requires."

From other parts of this case it appears that the Auditor sends to the register of the land office a book containing a list of the lands of non-residents the taxes on which are unpaid with the amount of taxes &c. The register then does not see the return either of the assessor, or of the collector, and yet the the court of appeals of that state presumes 1st. that the assessor has done his duty correctly, 2nd. that the collector has done his duty correctly, 3rd. that the Auditor has sent to the register a book containing a correct list of the lands of non-residents, on which the taxes are unpaid; and consequently that this register is officially informed that those lands were assessed, that the taxes were unpaid, and that the owners were non-residents. Thus informed the register sells the land and makes the deed; and the courts of that state decide that this deed of the register conveys to the purchaser a title prima facie good and valid, and that the presumption of this validity shall avail the purchaser, until it be proved that some illegality of the proceedings of the register, or of some of the subordinate officers, renders the deed invalid.

The Auditor of the State of Missouri stands one step nea-

rer to the fountain whence this official information flows, consequently there is one chance less for the commission of a mistake. Why then should not the presumption of the validity of the Auditor's deed be extended to the purchaser of this land, and also be indulged until the contrary be shown? The Supreme Court of the United States has decided, in the two cases of Stead's executors vs. Course, and Ronkendorf vs. Taylor's lessee, that the purchaser of lands sold by a collector for taxes, must prove the regularity of the proceedings of the collector's sale. But in this case the land was sold by the Auditor, and not by the collector of the taxes; as in Kentucky the land was sold by the Register, and not by the collector. The collector sells in his county the lands of the delinquents of that county, the Auditor sells at the seat of government the lands of the delinquents of the whole State in the view too of persons collected together from every part of the State either to pay the taxes due on their own lands, or to purchase the lands of others that may be offered for sale. He is incited by no interest to raise the money to pay taxes, he receives no money, it being all paid to the treasurer. Moreover all his acts are of record. The case of Stead's ex'rs vs Course in reality is nothing more than the decision of a Georgia Court on their own statute; for in deciding cases arising under the statutes of a State legislature the Supreme Court of the United States always make the decisions of the respective State courts; the rule of their own decision. The case of Ronkendorf vs. Taylor's lessee originated under an act of Congress, and the Supreme Court of the United States were in this case unshackled by the decisions of any State court. But that sale as before observed was made by a collector of taxes, and this by the Auditor of Public Accounts. Should this difference in the two cases, be considered not a sufficient reason for a difference in the rule of evidence which should govern in the two cases; then I would say that the Supreme Court of the United States in deciding that the purchaser of land at the sale of a collector of taxes "*must prove the regularity of the procedure*" have decided inconsistently with their own rule declared in the same case. For the

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collector making sale of the lot to raise money to pay taxes for the use of the corporation, was actually an officer acting in pursuance of a duty expressly enjoined on him by law with the register, who made out the tax books from the assessor's lists corrected by the court of appeals, or with the assessor who returned the lists from which the register under the correction of the court of appeals made out his tax book, and for that reason he was equally entitled to the credit and presumption of having done his duty until the contrary be proved. It would be a base and unprincipled act in a government to cause the land either of a resident or of a non-resident to be sold for taxes on evidence insufficient to raise the presumption that the owner was delinquent. It would be not less unprincipled in that government after receiving the money of the purchaser to tell him that the evidence, which, before the sale, had raised the presumption that the owner of the land had been delinquent should not be held by its courts to be sufficient to continue that presumption in his behalf until the person, whose lands had been sold, proved the contrary. And whether this rule be made by the legislature expressly or by implication it is equally unprincipled. Courts ought therefore in my opinion to lean against such a construction of the acts of their legislatures. But the reason given by the Supreme Court of the United States for that decision is also insufficient, or rather no reason is given. That court says, "to divest an individual of his property against his consent every requisite of the law must be complied with," &c. In all communities, and especially in these United States every person assents either expressly or impliedly to the laws in force, and consequently, each member of the community consents, that if he fail to pay his taxes, his property may be sold to raise the money in such manner as the law has, or may prescribe; and nobody ever contended, at least in this state, that by the Auditor's sale and deed the non-resident was divested of his property. The only question was whether he, whose land had been sold by the Auditor, should not be held to prove that injustice had been done him in some part of the proceedings preparatory to the sale, or in the sale itself.

But the powers of the Auditor of Public Accounts of this State, equally with those of the corporation of the City of Washington are all conferred by a public law. He is an officer too of much more relative importance to the State of Missouri, and to her courts than the corporation of the City of Washington is to the United States, and to their courts. The same observation may be made with regard to the revenue officers of the State of Kentucky, and the laws under which they act. The courts of that State then, having a less extensive jurisdiction than those of the United States, may without any manner of disrespect to the Supreme Court of the United States, be presumed to make much better decisions on their own revenue laws to them so vitally important, than that court would on the acts of Congress made for the regulation of the fiscal concerns of the corporation of the City of Washington. But the Kentucky courts have decided that the deed of their register conveys to the purchaser of lands, sold by him for taxes, a title *prima facie* valid, and for as good a reason the deed of our Auditor ought to convey to the purchaser of lands, sold by him for taxes a title *prima facie* valid. We are in the same case of *Ronkendorf vs. Taylor's lessee* told that because the powers of the corporation are conferred by a public law, therefore their acts prove themselves, and that the assessors acting under the authority of that corporation are presumed to be duly appointed. Then because our Auditor's powers are equally conferred by a public law, his acts also prove themselves, and his deed must be presumed to be valid, till the contrary be proved. In concluding then that the deed of the Auditor conveys to Suggett, the purchaser of the land, a title *prima facie* valid, I conceive that I am sustained not only by the two cases cited from the Kentucky books, but also by the case of *Ronkendorf vs. Taylor's lessee*, or at least by the rule of decision declared by that court in deciding the two first points in that case.

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That the deed of the Auditor to the purchaser of land at a sale for taxes, conveys to the purchaser a title *prima facie* valid.

3rd. Are the several certificates of the Auditor given in evidence made conformably to law, and if so made, what is their legal effect?

The first certificate in order of time is the certificate of

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purchase made by the Auditor to Suggett. Among many other things the Auditor certifies that the collector of Lincoln county did deliver to him according to law a list of lands of non-residents on which the taxes were unpaid.— By the 28th section of the revenue act of 1825 p. 674 the collector is directed to give to the purchaser of a tract of land, lot or any part thereof a certificate of such sale and by the 36th section of the same act it is made the duty of the Auditor and treasurer (Auditor alone now) to give the same kind of certificate, and the 11th section of the act of the 3rd January 1827 requires that this certificate shall always refer to the advertisement of record in the county. If then the Auditor did insert in his certificate "that the collector of Lincoln county did deliver to him according to law a list of lands, &c." it was done at the expense of his own labor, and his gratuitous insertions are not to be allowed either to injure the purchaser, or aid the delinquent non-resident.

There are two other certificates both of which are set out in the same instrument of writing, and they are both copied into the statement of the case, they are both made under the 11th section of the act above cited, which is in these words, "Be it &c. that upon all sales of real estate for taxes due thereon, made by the Auditor of Public Accounts and Treasurer, it shall be the duty of the Auditor and Treasurer to transmit to the recorder of the county wherein the land is situated, a copy of the advertisement of sale certified to be a true copy; and a further certificate that the provisions of the law in such cases made and provided have been complied with, which copy of the advertisement so certified, and further certificate shall be, by the recorder, recorded in the record of deeds, and a copy of such record shall be prima facie evidence of the facts contained in such certificates, whenever a sale under such advertisement shall come in question; and the certificate of sale to be given to the purchaser in such cases shall always refer to the record under which such sale was made.

The objection to these certificates is that they do not pursue the law; that they ought to state facts, that the act does not make the certificates, evidence of opinion, and inference

and matters of law, but only prima facie evidence of the facts contained in such certificates, that no ministerial officer can give his opinion on the law of the case, that a sheriff cannot return that he has served a writ according to law.

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The first certificate states that the collector did deliver a list according to law, and that the Auditor did by advertisement dated on the 10th day of April 1832 advertise according to law: these statements with perhaps many others made in the first certificate i. e. the certificate of sale, were not required by the statute, and the gratuitous act of the Auditor as before observed is neither to injure the purchaser nor to aid the delinquent non-resident.

To the certificate, of the advertisement no objection is taken.

The further certificate, which the law requires to accompany the advertisement is in the very words of the law, viz: "that the provisions of the law in such cases made and provided have been complied with" and the law declares that a copy of the record shall be prima facie evidence of the facts contained in such certificates. The only facts required by law to be stated are, in the first certificate that Suggett was the purchaser, in the second, that the copy of the advertisement sent to the recorder is a true copy, and in the third that the provisions of the law in such cases made have been complied with; for unless this be admitted to be a certificate of facts, then there is no certificate, and the only question here is, whether that part of the 11th section of 1827, which relates to the further certificate of the Auditor, be a dead letter, a nullity in law. And certainly if we are, in construing this section of the act, to restrict the meaning of the word *facts* to the sense in which it is technically used in a bill of exceptions as contradistinguished from conclusions of law, that part of the section will be a nullity. For the Auditor to state that the land had been assessed would have been superfluous and idle, for without assessment the collector could have had no list to inform him either of the taxes due, or of the non-residence of Paul Chouteau, and consequently he could have made no list of non-residents, whose

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taxes were unpaid, to deliver to the Auditor; for the Auditor to state at what time, at what place, and in what paper the advertisement of sale was made would have been equally useless, for no court sits to examine his proceedings either to forbid the sales or to annul them, after they have been made for any irregularity that may have occurred. The Auditor of Public Accounts of this State is not a ministerial officer, as has been insinuated, rather than said. He is a high executive officer of the state acting on the reports of the several collectors of the several counties, who themselves are immediately accountable to their respective county courts and to the treasury of the state for money collected, and to him for the list of non-residents whose taxes are unpaid; from their reports he draws his conclusions of law, which enable him to decide when the lands of non-residents are liable to be sold for taxes. And he who is legally qualified to decide when the lands of non-residents may lawfully be sold for taxes, may certainly, by an act of the assembly be authorised to certify that those lands have been lawfully sold. • or in the words of the act "that the provisions of the law in 'such cases made and provided have been complied with,' and that certificate, if the law so declare, will be good evidence. "The fairest and most rational method to interpret 'the will of the legislator is by exploring his intention, at 'the time the law was made, by signs the most natural and 'probable, and these are either the words, the context, the 'subject matter, the effects and consequence, or the spirit 'and reason of the law. Words are generally to be understood in their usual and most known signification, not so 'much regarding the propriety of grammar, as their general 'and popular use." 1 Bl. Com. p. 59. It has already been shown that it would have been useless to require the Auditor to state, in his certificates, the facts relating to the preparatory steps for the sale, for those facts were already accessible to those interested, and no court of revision and appeal sat to to revise and correct his decisions. We are bound in decency to suppose that the legislature did mean something when they directed him to certify, and we are equally bound to suppose that this certificate was intended

to be evidence of something. He was directed to certify OCTOBER TERM 1839.
 "that the provisions of the law in such cases made and provided had been complied with," he has certified it, and it is evident that the legislature intended this certificate to raise the presumption that every act preparatory to the sale had been duly performed, and that this presumption should avail the purchaser till the contrary be proved. Any person but one, who had learned a little law, and had improved that stock of learning by some experience in taking bills of exceptions would assent to this proposition, that it is a fact, that the Auditor has, or has not complied with the provisions of the law in making his sales of non-resident's lands. The legislature, in my opinion, never contemplated that the Auditor should state any fact either of assessment, or of non-residence, or of publication. When he certifies in the words of the law, "that the provisions of the law in such cases made and provided have been complied with," he has certified all that the law required him to certify; and if we will not allow this certificate of his legal conclusions to be received as evidence, then that provision of the law is nugatory.

My opinion, for the reasons above given, is that the Auditor's certificates are made agreeably to law, and that they ought to be received in the courts as evidence *prima facie*, that every provision of the law preparatory to the sale of the land, and in making that sale had been complied with. But it is urged that this certificate of the Auditor, if it be admitted to be evidence that he sent three copies of the advertisement of sale to the sheriff of Lincoln county, is not evidence that the sheriff set them up at the three most public places of the county, as is required by the 4th section of the act of the 18th of January 1831. When the Auditor's certificate raises the presumption that he transmitted the advertisements, the law itself raises the presumption that they arrived at the place of destination, and that the sheriff did his duty. Without this presumption the Auditor could not have sold; and the same presumption of law, that authorized him to sell, shall according to the authorities above cited, avail the purchaser till the contrary be proved. The books

That the Auditors certificates made under the provisions of the 11th section of the act of January 3rd 1827 were in conformity with the law, and that they should have been received as evidence *prima facie* that every provision of the law preparatory to the sale of the land, and in making that sale, had been complied with; and that it was sufficient for the auditor to state in his

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certificate in
general terms
that the pro-
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provided have
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plied with."

inform us that it is sufficient notice of a protest in the case both of a foreign and an inland bill of exchange, if the letter be put into the mail, even though it miscarry. But the testimony of the sheriff Watts proved the notices set up, as plainly as the most scrupulous could require. He committed indeed a blunder in stating that they were advertisements of lands sold; but as the law required no such advertisements, we are to presume that they were such as the law did require, especially as he says that he did not notice them particularly. The whole of the objections taken both to the certificates, and to their legal effect, appear to me to be nothing more than verbal criticism, which with equal plausibility might have been much farther extended.

4th. It was contended that the tax of $37\frac{1}{2}$ cents imposed by the 23th section of the act of 3rd January 1827 is unconstitutional, and that there is no evidence that this tract of land was of that class on which that tax was intended to be imposed.

The words of the section are, "It shall be the duty of the Auditor to make out duplicate copies of the non-resident tax lists in the month of January in each and every year; one of which shall be kept in his office by which to make sales, the other to be for the printer by which to advertise the lands to be sold for taxes, which shall be handed to him by the Auditor; and twenty-five cents shall be added as a tax on each tract advertised to be sold for taxes, and twelve and a half cents as an additional tax on each tract or lot the copies of which are made out by the Auditor for the purposes above mentioned after the 20th day of January in each and every year.

The record of the Auditor's advertisement, made in the office of the recorder of Lincoln county, shows that this tract of land was one of those subject to the tax of $37\frac{1}{2}$ cents; that advertisement was set out in the bill of exceptions. It is apparent from the letter and spirit of the section above quoted, that this tax of $37\frac{1}{2}$ cents was a tax on the delinquent intended, as the Auditor in his advertisement very correctly states to be an equivalent for the costs or expenses of advertising &c., and although it was no part of

his duty to state the object of the tax, yet it seems to me to have been entirely useless to lavish so much harsh language against him in a studied written argument, on that account. For by charging the sum as costs in the aggregate along with the taxes and penalty, he most certainly did not "commit an abuse calculated to hide his own errors so as to render detection extremely difficult, and enable him unquestioned to increase his own emoluments by multiplying tax sales." The amount of the state and county taxes may at any time be ascertained either at the office of the Auditor, or at that of the clerk of the county court, and a very moderate portion of skill in arithmetic will enable one to calculate the interest, and to add the tax of $37\frac{1}{2}$ cents. He can by no means multiply the tax sales, for they depend, for their number entirely on the collector's return. This tax then of $37\frac{1}{2}$ cents is a tax on the negligence of Chouteau to indemnify the state for costs of advertising his land to be sold for taxes: and it costs as much to advertise a small tract as a large one, as much to advertise a worthless tract as a valuable one. A tax for the support of the government ought to be in proportion to the value of the land; but a tax in the nature of a penalty to indemnify the state for the expenses of advertising the delinquent land to be sold for taxes ought to be in proportion to the costs of advertising.

By the 40th section of the revenue act of 1835 a tax of one dollar is imposed on each person convicted of a criminal offence. No exception was ever taken to this tax because one criminal might be richer than another. The tax of $37\frac{1}{2}$ cents is not in my opinion unconstitutional.

5th. Did the legislature intend that no land should be sold for the taxes due thereon at a less price than \$1.25 cents per acre; and is this sale void because the whole tract was sold?

The act of 1835, under the provisions of which this tract was sold, directs the Auditor to purchase the land for the state if no person will pay the taxes for the whole tract.— See sections 28 & 36 of that act. But the appellant relies on the case of *Stead's ex'rs vs. Course*, 4 Cranch 402 in which the Supreme Court of the United States decided that

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That the tax of $37\frac{1}{2}$ cents imposed by the 20th sec. of the act of 3rd Jan. 1831 on each tract of land advertised to be sold for taxes, as an equivalent for the expenses of advertising &c. is constitutional.

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the sale was void where the whole tract was sold for taxes by a collector. In that case the whole tract was advertised to be sold for taxes, and other circumstances indicative of fraud were proved. In this case the advertisement was, as the law requires, of the whole tract, or of so much thereof as would be sufficient to pay the taxes, and no circumstance indicative of fraud were proved.

The two cases resemble each other in this only, that in the one case the whole tract was sold for taxes, and in the other the whole tract was sold for taxes. But in the case cited the land was sold for the sum of \$552,89 a sum much larger than was probably due, for the amount of taxes did not appear in the evidence; and, in the case under the consideration of this court, the land was sold for no more than the amount of taxes &c. due.

That it was the intention of the legislature that no lands should be sold for taxes at a less price than one dollar and twenty-five cents per acre, and the sale of the land in controversy is not void because the whole tract was sold for taxes, it not appearing that any person was willing to pay the taxes for less than the whole tract of land.

The legislature then did not, in my opinion, intend that no lands should be sold for taxes at a less price than one dollar and twenty-five cents per acre, and the sale is not in my opinion void because the whole tract was sold for taxes it not appearing that any person was willing to pay the taxes for less than the whole tract of land.

6th. Did Laville and Morton acquire any precedence, because Chouteau's deed to them was recorded before that of the Auditor to Suggett was recorded?

The deed of Chouteau to Laville and Morton was executed on the 17th day of August 1831. By the 25th section of the revenue act of 1825 it is provided that there shall be a perpetual lien on all lands sold for taxes &c. This land was sold for the taxes of 1831, and therefore Chouteau conveyed the land to Laville and Morton subject to his lien and consequently it avails them nothing to have recorded a deed which conveys no title against the claim of the purchaser at the sale for taxes.

That the appellant did not gain any precedence on account of the deed to him for the land in controversy being recorded prior to that of the auditor possessed official information that the land in controversy had been assessed, that Paul Chouteau was a non resident of Lincoln county in the year 1831, and that his taxes for that year were unpaid, and that the law did not require the collector to inform the Auditor whether there

were, or were not personal property of said Chouteau in Lincoln county. It is moreover my opinion that the deed of the Auditor to the purchaser of this land is of itself good prima facie evidence of title in such purchaser, or his alienee; that the several certificates of the Auditor are made conformably to law, and that they are good statutory evidence that all the proceedings, from the assessment of the land to the sale thereof for taxes, were regular; that the legislature did not impose an unconstitutional tax on land when by the 20th section of the act of the 3rd of January 1827 the Auditor was directed to add twenty-five cents as a tax on each tract of land advertised to be sold for taxes, and twelve and a half cents as an additional tax on each tract of land the copies of which are made out by the Auditor for the purposes in that section mentioned, i. e. one for the use of the Auditor to make sales by, and the other for the use of the printer, and that there is evidence on the record of the case that this tract of land is one of the class subject to the tax last above mentioned. I am further of opinion that the legislature did not intend to take land for taxes due from non-resident land holders at the price of one dollar and twenty-five cents per acre in cases where no person would give more, and that the Auditor acted correctly in selling the whole tract for the taxes due, no person offering to pay them for less; that it avails Morton the appellant nothing that Chouteau's deed for the land in controversy to Laville and Morton was recorded before the Auditor's deed to Suggett.

The proofs of the correctness of the Auditor's proceedings being all matters of record, which the law presumes to be in this case good prima facie evidence, and the plaintiff in the circuit court having offered no evidence there to invalidate those proofs, it became, in my opinion, the duty of that court to direct the jury to find for the defendant there, appellee here. That court then, in my opinion, committed no error either in refusing to give the instructions asked by the plaintiff, or in giving those asked by the defendant, and therefore its judgment ought in my opinion to be affirmed.

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auditor to ap-
pellee's gran-
tor, as the
25th sect. of
the revenue
law of 1825
provides that
there shall be
a perpetual
lien on all
lands sold for
taxes, &c.

That the
proofs of the
correctness of
the auditor's
proceedings
being all mat-
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—which the
law presumes
to be, in this
case good *prima facie* evi-
dence—and
the plaintiff
in the circuit
court having
offered no evi-
dence to in-
validate those
proofs, it be-
came the du-
ty of that
court to di-
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to find for the
defendant.

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1. The 2nd sect. of the act concerning ejectments (R. C. 1835, p. 234,) providing that ejectment may be maintained &c. against any person not having a *better title thereto*, under and by virtue of an entry with the register and receiver &c., was intended simply to place these entries &c. upon the footing of other legal titles, not meaning otherwise to alter any of the established rules and principles governing the action.
2. Where there has been an express reservation of lands for sale by the U. S. and the register and receiver sell the lands so reserved, there can be no doubt, that their acts would at least be held void in any suit in which the U. S. might be a party—But *quære*, are such sales mere nullities, and could a defendant resting on a mere naked possession show them to be such?
3. The mere designation of a claim to land upon the books of the register of the land office by a stranger, is not a sufficient compliance with the provision of the act of Congress of 3rd March 1811 to authorize the register to withhold such land from sale.
4. Whatever irregularities may be committed by the agents of the U. S. in the disposal of the public domain, their acts are to be held *prima facie* valid, and no third person can be allowed to impeach them unless they should be disclaimed by the U. S. Whatever is therefore merely *avo dable*, when the agents had a general power to sell and when there has been no express reservation of the land sold, the sale is good as to all the world except the U. S. or those claiming under them, and no one standing on a naked possession, shall be allowed to question the validity of such sale.
5. It does not follow that because the register of the land office was not present when certain lands were sold, he necessarily performed that act by deputy. Before that question could be determined it would be necessary to look into the nature of the act performed. If a mere ministerial or clerical act, it might be performed by deputy. If a Judicial act—and the register *does* for some purposes, and in some matters act as a Judicial officer—as in granting pre-emptions,) the act could not be performed by deputy.

Error to Pike Circuit Court.

Wright for Plaintiff.

1st. That there is not in the record any evidence of the locality of the claim, nor that it embraced the land in question.

2nd. The laying down that claim on the registers map, was not warranted by any law, and was an unauthorized enforcement of the plat.

3rd. The claim as laid down in the map, does not in fact embrace all the land in question.

4th. If Dubruiels' claim were of that class intended to be reserved from sale by the acts of Congress, the reservation would be in operation for want of location.

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5th. But Dubruiels' claim had ceased to exist and the land had become subject to general disposition as other lands a year and more before Hunter's entry. Act of Congress 26th May 1824. Do. 24th May 1823. Rev. Co. p. 234, § 2. 5th Bacon 207-S. 3 Bur. 1259. 6 Pit. R. 691. 7 Pit. R. and 12 Pit.

Campbell & Wells for Defendant.

1st. That to constitute a sale by the register and receiver legal, the circumstances must exist. 1st. There must be public sale. 2nd. That land must be liable to entry by law. 3rd. There must be public officers authorized to sell. 4th. These officers must actually make a sale. The receiver is a public officer and whenever he does an act within the general scope of his power, the law will presume the existence of all the facts necessary to render his act valid. 3 Starkie Ev. 1250. But this is only a legal presumption and may be rebutted by evidence. 3 Starkie Evidence 1252.

2nd. Does an entry with the register and receiver of land not offered at public sale vest a title in the purchaser? The act of Congress establishing the land office at Palmyra permitted the sale by register and receiver of such land only as had been offered at public sale at St. Louis and had not been reserved from sale. See land laws, vol. 1, page 194, sec. 10. Do. 1, do. 294, sec. 3. Do. 1, do. 384, sec. 2 & 3. Do. 2, do. 25. Wirt's opinion.

3rd. The third point is in all respects governed by the same laws and principles as the second.

4th. Can the register lawfully delegate his authority?—It is a general rule that a power given, the execution of which requires skill, or which implies personal trust or confidence must be executed by the agent or officer in person. See Paley on agency 148-9. Vesey jr. 251-2-236.

Opinion of the court delivered by Napton Judge.

Hunter brought an action of ejectment against Hemphill in the Circuit court of Pike county, to which defendant pleaded not guilty. In support of his title the plaintiff relied

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on two certificates of purchase made by the receiver of the land office at Palmyra, the first being for the east half of the south east quarter of section No. 8, T. 53, R. No. 1, containing 80 acres, and the second for the west half of the south east quarter of the same section. The defendant admitted the possession of the land as charged in the declaration, and the plaintiff closed his testimony. The defendant then introduced a copy from the Registers office at Palmyra of the map or plat of Range 1 & 2, west township 53 & 54, on which map is the land in controversy. William Wright, the Register of the land office, testified that he entered upon the discharge of the duties of his office 29th of July 1830, that, on the plat aforesaid, Dubruiel's claim was marked in a feint pencil mark which was on the book when he entered the office, and that he had no knowledge of the time when and by whom the pencil marks were made; that he was not present when the entry was made by the plaintiff, having entrusted the business of his office for some time to Mr. Green, with whom he left blank certificates of application signed by him (the Register); that it was usual for Mr. Green and himself to discharge the duties of both offices in the temporary absence of either; that they mutually deputed each other as agents for this purpose and left blanks signed by them respectively. Mr. Wright further stated, that if he had been present, he could not have permitted the entry of plaintiff, because the land was included within the pencil lines, and he considered it reserved from sale, from that fact; that he does not know that the land in controversy has been offered for sale publicly; that he never offered it for sale, and had frequently refused to permit persons to enter the lands included within the pencil lines because he considered them reserved from sale.

Mr. Jordon testified that in 1818, in company with others, he went to the land sales in St. Louis; that the claim of Dubruiel was not then laid down; that the land in Range 2 were offered, for sale and many pre-emptions were offered within the lines of Dubruiel's claim as afterwards laid down; that defendant had not been long enough on his land to be entitled to a pre-emption; that in January or February

ry 1819 he again attended the land sales at St. Louis and while there he saw a man, whose name he thinks was Barcroft, marking down on the book of the register a claim which the register told him was Dubruiels claim; that the marks were made with a pencil; that after that he saw but one piece of land sold in the limits of said claim, and that was a piece bought by a Mr. Byers only a part of which lay in the claim, the purchaser (Byers) agreeing to loose that part lying within the claim, if it should be confirmed; that he never saw the land in controversy offered at public sale, either at that place or Palmyra; that he knew of only one sale of any land within the claim and that was a case of relinquished lands sold by Carson, the former register at Palmyra. Hemphill the defendant came to the country in 1816 or 1817 and has been in possession of the land in controversy ever since. He also went to St. Louis in 1819 for the purpose of buying the land not offered for sale. It was proved by several other witnesses, three or four in number, that they were at the land sales in St. Louis in 1819, and that they did not see the land in controversy offered for public sale; that they understood the lands included in the claim were not offered for sale in consequence of the laying down of Dubruiel's claim; Mr. Byers saw the claim as laid down on the books at St. Louis in 1819, and at his solicitation the register set up his piece for sale, and he bought it, under the circumstances mentioned by Jordan. It was proved by a Mr. Smith that he had applied to enter at the Palmyra office a piece of land within the claim, and the register refused to let him have it; (Mr. Wright register.) He also stated on one occasion, time not mentioned, he went to enter for himself a tract in the claim, and was requested by defendant to enter the land in controversy but on being informed by the register, Mr. Wright, that he (Smith) could not enter his land, because it was within the claim as marked on the book, he made no application for it because his land was in the same situation.

On the part of the plaintiff, it was proved by Henry, that he entered the land marked on the copy of the map at Palmyra at the time recorded on it. On inspection of the

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map Mr. Henry's entry is in Range 1, Township 53, and is the east half of the north east quarter of section 8, and within the pencil marks designating Dubruel's claim. Carson was register and Lane receiver. Carson was not present, but his deputy Jones received the application. Witness told Jones the land was said to be in the claim of Dubruel. Mr. Fitzhugh's entry was a pre-emption right; his application was to Mr. Wright. From an inspection of the plat it seems, that Mr. Fitzhugh entered in Range 1, two pieces, one on the 21st Dec. 1830, and the other on the 28th May 1831, being the south west quarter of Section 6, in Township 56, range aforesaid, and within the pencil marks supposed to designate Dubruel's claim. Mr. Bennett entered a half quarter section in Range 2 and within the pencil marks, by application to Mr. Wright, the register, which was for pre-emption. Mr. Allison entered three tracts, of 80 acres each, parts of all the tracts lying within the pencil marks designating Dubruel's claim, in range 1 in 1827, and the other two pieces in 1835, Wright was the register, and application made to him. Mr. Templeton, another witness, testified that he bought the east half of the N. W. quarter, of section 5, T. 53, Range 1, west, on the 1st August 1831, at public sale; gave more than the minimum price for his land, and obtained a patent for his land in about six months thereafter. This entry is also within the claim of Dubruel, as laid down on the map. Mr. Wright was the register at the time, and the sale was made by him. Mr. Templeton stated that his piece was formerly claimed by pre-emption and perfected, and thereupon sold, some said it was relinquished. Other witnesses testified in relation to their entries as marked on the plat.

On this state of facts, as appears by the bill of exceptions, the defendant moved the court to instruct the jury;

1st. That if they shall believe from the evidence, that the entry of the defendant of the land in controversy, made in the absence of the register of the land office, by mistake of the person having charge of the register's office, and that the said land had never, at the time of said entry, been offered for sale at public auction. then the said entry of said

plaintiff does not invest him with such a title as will enable him to recover of the defendant in this action. OCTOBER TERM
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2nd. That if they shall believe from the evidence that the land in controversy had not (at the time of the plaintiff's entry) been offered for sale at public auction, but had been reserved from sale by the register and receiver, that, in that case, the plaintiff's title under said entry is not sufficient to enable him to recover of the defendant in this action.

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3rd. That if they shall believe from the evidence that the land in controversy had, up to the time of the plaintiff's entry, been reserved from sale, on account of said land or a part thereof being supposed to be within the Spanish claim of Antonio Dubruil, of 10,000 arpents, then the said plaintiff is not entitled to recover of the defendant in this action. Which instructions, as prayed by defendant, were given, and thereupon the plaintiff moved the court to give the following:

1st. That the two land receipts given in evidence by the plaintiff, if the same be true and genuine, are sufficient evidence of title in the plaintiff, to the land therein mentioned to sustain this action of ejectment, unless the defendant, has shown a better title in himself, or some other person.

2nd. That it is not legally incumbent on the plaintiff, in order to give validity to his entries which are given in evidence, to prove that the requirements of the laws of Congress, previous to the sale of the land by private entry, have been complied with.

3rd. The plaintiff is not bound to prove, in order to enable him to recover in this action that the President of the United States had by proclamation appointed a time for the public sale of the lands in question, nor that the said land was ever in fact offered for sale at public auction.

4th. There is no legal evidence that the claim of Dubruil was lawfully laid down upon the map of the register's office, as testified by Mr. Wright and Mr. Jordan.

5th. If the jury believe from the evidence in the cause, that the plaintiff entered with the register and receiver of the land office, at Palmyra the land in controversy and that

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the defendant was in possession at the institution of this suit, and if they shall also find from the said evidence, that the defendant has only a naked possession, they ought to find for the plaintiff.

6th. That the defendant cannot maintain a naked possession as against an entry with the register and receiver, by showing that the land had not previously been offered for public sale.

7th. That if the jury shall believe from the evidence in the cause that the plaintiff entered the land in controversy with the register and receiver, at the land office in Palmyra, they should find for the plaintiff, unless the defendant shows by evidence a better title in himself, that is, not in another person.

The court gave the 1st, 5th and 7th instructions asked by plaintiff, and refused the 2nd, 3rd, 4th and 6th and gave all the instructions asked by defendant, and, by way of explanation, instructed the jury further that if the jury believe from the evidence that the supposed entry was made, in the absence of the register, with a person left by him in the charge of his office, and not with himself, they must find for the defendant, because he could not delegate his authority.

After verdict for defendant, the plaintiff moved for a new trial, because of misdirection of the court and insufficiency of the testimony to justify the verdict; which was overruled. The errors assigned by the plaintiff in this court, are:

1st. That the court erred in giving the instructions asked by defendant.

2nd. The court erred in refusing to give the 2nd, 3rd, 4th and 6th instructions asked by plaintiff.

3rd. The court erred in giving the explanatory instructions for defendant.

4th. It erred in over ruling the motion for a new trial.

Before proceeding to consider the various defences set up in this case, a preliminary enquiry necessarily arises in relation to the proper construction of our statute regulating the action of ejectment. The act provides that an entry with the register and receiver of any land office in the Uni-

ted States, shall enable the holder to maintain an action of ejectment against any person not having a better title thereto. It is argued from the phraseology of this act that where the action is brought on an entry with the register and receiver, that title must prevail, unless the defendant can show a better title in himself, and he will not be at liberty to set up title in a third person. There is, it must be admitted, some difficulty in ascertaining what was meant by the better title which the legislature speaks of. We should be more likely however, to arrive at a correct interpretation by looking at the evil, which the legislature proposed to remedy, than by any critical examination of their language. Nearly all the lands occupied by our citizens have been purchased by the United States, and the only evidence of title were these receipts from the federal officers, until the patents issued. In the early settlement of the country, no great inconvenience was felt from the short delays that intervened between the entries at the land office, and the issuing of the patents, but as emigration increased, and the business of the land office multiplied, years would elapse before the purchaser from the government could obtain his patent. It is a matter of history, I believe, that these documentary evidences of title from the land office were believed to constitute, at least, but an equitable title, and consequently would not enable the holders to maintain an ejectment.—The legislature with a view to remedy this evil, declared them sufficient evidence of legal title to maintain ejectment, and intended thereby simply to put them upon the footing of other legal titles; not meaning to alter any of the established rules and principles governing the action, except so far as that point was concerned. If a different construction prevail, and a more literal interpretation be given to the words of the act, the consequence will be that they have not only elevated these titles (by entry, New Madrid locations, pre-emption, &c.) to the rank of legal titles, but have placed them on a more favorable footing, in a very important particular. They have conferred on them privileges which do not belong even to a patent. The common law rule in actions of ejectment, that the plaintiff must recover on the

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The 2nd
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ments (R. C.
1835, p. 231.)
providing
that eject-
ment may be
maintained
&c. against
any person
not having a
better title
therein, under
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of an entry
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entries &c.

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upon the footing of other legal titles, not meaning otherwise to alter any of the established rules and principles governing the

strength of his own title, and not on the weakness of the defendants would be abolished; and though the plaintiff in possession of the receiver's receipt may have passed his title to another, the defendant cannot be permitted to show this in defence, because he has no title in himself, such a construction would be going farther than the evil, which the legislature aimed to remove, would require, and if the argument from inconvenience might be allowed to prevail in any case, this would seem to be one of that description. 4 Bac. Abr. 652.

Believing then that this title is not of such a paramount character as to preclude the same defences, which are admissible in other actions of ejectment, I proceed to examine the nature of the defence set up by Hemphill, and the sufficiency of the evidence to maintain that defence. It is admitted that the entry with the register and receiver is prima facie evidence of title and that it is not incumbent on the holder of such title to prove that various prerequisites of the law have been complied with. But it is insisted that the defendant may show that the entry was illegal and void, and that consequently no title passed from the United States, by such attempted sale. The Supreme Court of the United States, in the case of Wilcox vs. the lessee of McConnell, decided at the January term 1839, have declared that if the register and receiver undertake to grant pre-emptions in land, in which the law declares they shall not be granted, then they are acting on a subject matter clearly not within their jurisdiction, as much so, as if a court, whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum. This we understand to be one of the cases in which the entry with the register and receiver would be absolutely void as against the United States, those officers having undertaken to exercise a power not given to them by law, but expressly withheld. This opinion is strengthened by the official opinion of Mr. Wirt, given to the commissioner of the general land office, on the 22nd Oct. 1828, (see land laws &c. vol. 2, part 2, p. 39.) "On the case stated from the general land office, under date of the 6th inst. it is my opinion that no patent ought to issue for lands which have been inadvertently sold without

any legal authority to sell them. The mistake having been brought to the knowledge of the commissioner of the general land office before the emanation of the patent, lands excepted from sale by acts of Congress ought not to be sold, and if they have been inadvertantly sold, the sale is void for want of authority. To issue a patent for land, which the government had no power to sell, is a measure which I cannot advise. Those sales are now in legal contemplation mere nullities." Such is the strong language of the Attorney General and I quote it not so much as any authority, which indeed the acknowledged abilities of the able jurist who penned it would justly give it, but chiefly with a view to show the light in which the executive authorities of the United States have viewed sales of this description. There can be no doubt that where there has been an express reservation, and the register and receiver sell lands so reserved, their acts would at least be held void in any suit in which the United States might be a party. Whether they are void to the extent claimed by Mr. Wirt, and are mere nullities, and a defendant resting on a naked possession can show that to be such, is a question which it is not important to determine. In this case a majority of the court incline to the opinion that the defence is admissible. Granting that such defence is good, we proceed to consider the ground taken by the defendant, with a view to establish a title in the United States and to show that the acts of the register and receiver, in allowing Hunter to enter the several tracts of land described in the declaration, were null. It is urged:

1st. That, in accordance with the provisions of the act of 3rd March 1811, (land laws p. 591) the land in question was expressly reserved from sale in consequence of the claim of Dubrueil for 10,000 arpens.

2nd. That the land never was actually offered at public sale, and consequently was not subject to private entry.

3rd. That the register had no power to appoint a deputy, and there was therefore no sale in fact.

First; It does not appear that either the laws of Congress or the regulations of the commissioner of the general land office have provided any specific mode for complying with

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Where there has been an express reservation of land for sale by the U. S. and the register and receiver sell the lands so reserved, there can be no doubt, that their acts would at least be held void in any suit in which the U. S. might be a party—But *quere*, are such sales mere nullities, & could a defendant resting on a mere naked possession show them to be such?

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The mere designation of a claim to land upon the books of the register of the land office by a stranger, is not a sufficient compliance with the provision of the act of Congress of 3rd March 1811 to authorize the register to withhold such land from sale.

the proviso to the 10th section of the act of 3rd March 1811, which declares that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has, in due time and according to law, been presented to the recorder of land titles in the District of Louisiana, and filed in his office for the purpose of being investigated by the commissioner appointed for ascertaining the right of persons claiming lands in the Territory of Louisiana. To show a compliance with its provisions in the case before the court the testimony of Wright and Jordan is relied on. The evidence of Jordan shows, that in 1818, the lands in range 2, within the supposed claim were offered for sale at the land sales in St. Louis, and that various pre-emptions were allowed, upon the land included within Dubrueil's claim. This witness further testified, that in 1819, whilst attending the land sales at St. Louis, he saw a man, whose name he thought was Barcroft, marking down in pencil lines the claim of Dubrueil upon the books of the register. Mr. Wright, the register, testified that the lines marking on the map the claim of Dubrueil are in faint pencil marks, and were on the books when he went into office, (29th July 1830) but that he had no knowledge of the time when or by whom the pencil marks were made. No act of Congress expressly reserving this land is shown, nor any other compliance with the provisions of the act of 1811, unless we acknowledge the authority of Mr. Barcroft to designate the claim upon the books of the register. It is true that the commissioner of the general land office, in some instructions to the register at St. Helena, gives some general directions in relation to the ascertainment of private claims, and it is possible, and indeed probable, that similar instructions may have been given to the other registers. On such a state of evidence a jury would hardly infer that there was an express reservation under the act of 1811, but the act of Congress of 26th May 1834 (continued by act of 24th May 1828) expressly provides that persons claiming lands within the State of Missouri, by virtue of any French or Spanish grant, may prosecute their claims before the district court of the State of Missouri. The 5th section declares that any

claim to lands within the provisors of this act, which shall not be brought by petition before the said courts within two years from the passing of this act, or which after being brought before the said courts shall, on account of the neglect or delay of the claimant, not to be prosecuted to a final decision within three years, shall be forever barred, both at law and in equity, &c. The 7th section says, that in each and every case in which any claim tried under the provisions of this act, shall be barred by virtue of the provisions contained therein, the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district. The act of May 24th 1828 continues in force the provisions of the above named act until the 26th May 1831, and declares that the courts having cognizance of said claims shall decide upon and confirm such as would have been confirmed under the laws, usages and customs of the Spanish government for two years from and after the 26th May 1828, and no longer. The entries of Hunter were made on the 9th and 11th July 1831. It is admitted that the claim of Dubruel was not confirmed until Nov. 4th 1833, by the then acting board of commissioners in St. Louis. There was a period then of nearly fourteen months, from the 26th day of May 1830 to the 9th July 1831, during which the land was declared by the laws of the United States to be held and taken as a part of the public land of the United States, subject to the same disposition as any other public land in the same district. There was nothing to prevent Hemphill, the defendant, who from the evidence appears to have been living on the land since 1816, from claiming his rights under the pre-emption laws then in force. There was no evidence then that the claim of Dubruel ever was positively reserved from sale by any law of the United States, and if reserved under the general provision which reserved all lands upon which there was any Spanish or French claim, there was no proof of the existence of any such claim upon the land in question at the time sale was made and certainly no proof of any legally author-

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ized reservation by the register of the land office, in accordance with the provisions of law.

2nd. The second instructions given by the court, at the instance of the defendant, assumes that if the land in controversy had not been offered for sale at public auction, but had been reserved from sale by the register and receiver, the plaintiff's title was insufficient to enable him to recover. This instruction brings up the position assumed by the plaintiff in his 6th instruction, and which is the reverse of the one just recited, which was given for the defendant. The 6th instruction asked by the plaintiff was, that the defendant can not maintain a naked possession as against an entry with the register and receiver, by showing that the land in controversy had not been offered at public sale. The question involved in these instructions is undoubtedly one of immense importance in this country, where three-fourths, or rather nine tenths of the land are derived from the General Government, and the holders have no better or other evidence of title than the receiver's receipt, and in some instances the patent certificate. Is it true that a defendant in ejectment, who claims no title under the United States himself, but stands on his naked possession can avail himself of a defence grounded on the irregularities or misconduct of the government officers? That the defendant may show title out of the plaintiff and in the United States seems to be sanctioned, if not by the express decision of the Supreme Court of the United States, in the Baubin claim, at least countenanced; for the language of the court is, that where the register and receiver act upon a subject matter not within their cognizance, their acts are not merely voidable, but *void*. But it must be recollected that that was a controversy in which the United States was substantially a party, Wilcox, the defendant, having claimed possession, as an officer in the army in possession of a military post, under the express order of the Secretary of War. Admitting the correctness of the decision in that case, we might well pause, before we adopt in extent the language of the learned judge who delivered the opinion without reference to the question really at issue before the court. It is unnecessary to enter into an investigation of

the distinction between void and voidable acts. It is sufficient to say, that acts which are even held void in common legal parlance as to some persons are not necessarily void as to others, and where Mr. Justice Barbour declared certain entries, made with the land officers, of land expressly reserved from sale to be absolutely void and null, it certainly was only necessary he should have declared them so, as against the United States, and those claiming under them. A. makes a deed to B. to-day, and to-morrow makes another deed to C. for the same land, who has his deed regularly recorded, and has no notice legal or actual of the first deed, the deed to B. is said to be absolutely void as to C., though very good and binding between the parties. The decision of the Supreme Court in the Beaubien case only established that the defendant in ejectment, only claiming under the United States, could show that the acts of the register and receiver were absolutely void having been in relation to a subject matter over which they had no power. Admitting that the defendant claiming under the United States could set up this defence, and admitting farther that any defendant who relied on his naked possession could make the same defence, the instruction of the circuit court given at the instance of the defendant goes still further, and declares that the defendant may even avail himself of facts in *pais* which could only make the entry avoidable. To carry the doctrine to this extent would in our opinion be contrary to established doctrines and sound policy. Whatever irregularities might be committed by the agents of this general landed proprietor, the United States, their acts are to be held *prima facie* good, and no third person can be allowed to impeach them, unless the principal should think proper to disclaim them.—Whatever is therefore merely avoidable when the officers had a general power to sell, and where there was no express reservation of the land sold, the sale is good as to all the world except the United States, or those claiming under them; and no one standing on a naked possession shall be allowed to question their validity. It seems scarcely necessary to examine the evidence on this point; the burthen of proof rested on the defendant and yet the only proof to ne-

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Whatever irregularities may be committed by the agents of the U. S. in the disposal of the public domain, their acts are to be held *prima facie* valid, and no third person can be allowed to impeach them unless they should be disclaimed by the U. S. Whatever is

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gative the fact of an offer to sell publicly was founded on the testimony of two or three witnesses, that in 1819, whilst the books were kept at St. Louis, the land in Range 1, and included in the supposed claim of Dubrueil was not allowed to be entered, but that various sales were made in Range 2, which were afterwards embraced within the limits of said claim when traced out on the map in the register's office.— Various sales are made at St. Louis and in Palmyra, in Range 1, though various applications were made at such place and rejected. If the lands in question were on the 9th of July 1831, a portion of the public domain, coming within the purview of the proclamation of the President of the United States, dated 25th March 1831, it was the duty of the register to offer them for sale; and to allow the defendant to prove that the lands were not in fact offered for sale would be allowing him to take advantage of inadvertencies, irregularities and omissions of duty on the part of those public officers which he has at least no right to complain of. By looking at the instructions from the commissioner of the general land office to the register and receiver at St. Louis, Franklin, Palmyra, Jackson and Lexington, dated June 25th 1831, (land laws instructions, opinions, &c. vol. 2nd, page 745,) we find that the lands in dispute were directed to be sold. The circular letter says, the question has been asked whether the unconfirmed private claims in Missouri are subject to sale under the proclamation of the President, dated 25th March last, and after rehearsing the various acts of Congress providing that after the 26th 1830, those claims shall be barred, proceeds to direct the officers as follows; such unconfirmed claims therefore formerly reserved from sale under the act of the 3rd March, 1811, as have not been brought before the courts or prosecuted to a final decision under any of the acts of Congress above mentioned, are subject to be offered at public sale, and you are hereby directed to offer the same under the proclamation of the President of the United States above alluded to. The presumption arising from the facts is therefore against the assumption of the defendant that the lands were never offered for sale.— We are further of opinion that the defendant should not

have been allowed to show that the land in question had never been offered at public sale, and consequently the 6th instruction asked by the plaintiff was improperly refused.

The third ground of defence assumed in the case was that the register had no right to depute his authority to another much less the receiver, and that therefore the entry was void. The instruction of the court on this point was very broad. That instruction was, that if the jury believe from the evidence that the supposed entry was made in the absence of the register, with a person left by him in charge of his office, and not with himself, they must find for the defendant, because he could not delegate his authority. The court in this instruction place the validity of the entry entirely upon the question of the presence or absence of the register, and then proceed to declare the law arising upon a supposed state of facts, assuming that if the register was absent, he necessarily acted by deputy. The court declare such acts illegal and void. I am unable to perceive how the consequences result which the court assumed would result and how it follows that because the register was not present when a certain act was done he necessarily performed that act by deputy. Before that question could be determined, it would be necessary to look into the nature of the act which was to be performed, if a mere clerical act, it might have been performed by deputy; if a judicial act, and the register does, for some purposes, and in some matters, act as a judicial officer (as in granting pre-emptions) the act could not have been performed by deputy. The instruction assumed the broad position that no act of the register, either ministerial, clerical or judicial, could be performed except in proper person, and left with the jury merely to say whether the act in question was so performed or not. The court erred in giving this instruction.

For the reasons above given, the judgment of the circuit court is reversed and remanded.

clerical act, it might be performed by deputy. If a Judicial act—and the register does for some purposes, and in some matters act as a Judicial officer—(as in granting pre-emptions,) the act could not be performed by deputy.

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It does not follow that because the register of the land office was not present when certain lands were sold, he necessarily performed that act by deputy. Before that question could be determined it would be necessary to look into the nature of the act performed. If a mere ministerial or

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1. A change of venue cannot be granted on application of the *owner* of a slave indicted for murder. The slave should petition in person for such change.
2. The 2nd and 3rd sections of the act of February 6th 1836 concerning crimes and punishments, providing that any slave thereafter convicted of a *felony* &c. shall be punished by whipping, &c. were intended only to substitute a punishment in lieu of that prescribed in the repealed sections; leaving slaves still punishable with *death* for murder in the first degree.
3. Were there room for doubt on this subject, the 27th sect. of the 3rd article of the state constitution, providing that a slave convicted of a capital offence shall suffer the same degree of punishment, and no other, than would be inflicted on a free white person for the same offence, settles that doubt.
4. No statute shall be construed in such manner as to be inconvenient or against reason.
5. Evidence of what a witness declared on a former occasion respecting the guilt of a prisoner on trial, is not admissible to prove the guilt of the prisoner.

Appeal from the Circuit Court of Warren County.

Wells and Bates for Appellant.

1st. The circuit court of Lincoln county erred in granting a change of venue upon the application of William C. Prewitt, the master of the prisoner, and the circuit court of Warren obtained no jurisdiction by said order.

2nd. The circuit court of Warren erred in passing sentence of death on said prisoner, such sentence being without warrant of law.

3rd. The circuit court of Warren erred in over ruling the motion for a new trial. See Revised Code page 486-7, sec. 15, 16, 17 and 18. Spencer Ch. J. in Bigelow vs. 19 J. R. 32-40. See also 5 J. R. 41. 8 J. R. 90. 5 Con. R. 28. 8 J. R. 149. 1 Dall. The act of the 6th Feb. 1836, page 60, repeals the 31-2-3 and 4 sections of the 9th art. of the law of crimes and punishments, R. C. p. 215. The R. Code, p. 167, art. 2, section 3, defines murder in the 1st. degree. Acts 1836, Mo. Decisions vol. 5, 1 semi-an. part p. 71. R. C. page 166, 557. See Boner's case, last reports M. R. page 379.

Statement of case.

This is an indictment for the murder of William Florence

against Fanny, a slave of William Prewitt. The indictment was found in Lincoln circuit court, the county in which the murder is charged to have been committed, at the November term of said court 1838. The defendant was arraigned and pleaded not guilty. At the same time, on the petition of Wm. C. Prewitt, the master, the court ordered a change of venue to the county of Warren. At the April term of the Warren circuit court 1839, the prisoner was tried, found guilty of murder in the first degree and sentenced to death. From that judgment the defendant has appealed to this court. After verdict a motion was made for a new trial and over ruled by the court. A bill of exceptions was filed, excepting to that decision by which all the evidence in the case was saved, the order for a change of venue is as follows: "Now at this day William C. Prewitt, the master and owner of said slave Fanny, personally appears in open court and files his motion and affidavit for a change of venue in this cause. It is thereupon ordered by the court that the venue in this cause be changed to the county of Warren in this State, and that the clerk of this court make out and transmit to the clerk of the circuit court of said county of Warren a full transcript of the record and proceedings in said cause, with all the original papers filed in said cause and forming a part of the record thereof."

Ellick, a witness, stated that he was acquainted with William Florence, son of Mr. Wm. Florence; that William the younger was about 9 or 10 years old as he supposes; that on Saturday, sometime in September last he thinks, William and Thomas (another younger son of Mr. Florence) were missing; that Mr. Florence told him so that evening at his masters house; that he saw the children no more until the next Tuesday, when he saw their dead bodies after they were found; that he does know how they came by their death, and does not who killed them; that on the day they were missing he was in his masters orchard several times, and about the house; that he did not see Mr. Florence's children that day nor for several days previous; that his mother never told him that she had killed the children; that his mother did not tell him that she had seen them that

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day; that Fanny, the prisoner at the bar, is his mother; that he knew nothing of either killing or hiding of the children. He also swore that, on the day the children were found, he and his mother Fanny and his father Ben and his uncle Green were all arrested and taken into custody, and that on the next day he was taken out from the rest by Mr. Sitton the sheriff, and by Mr. Hammond, and they told him if he did not tell who killed the children, they would hang him; that if he would tell they would let him off; that he told them he knew nothing about it; that they then put a rope around his neck and hung him; that he then told them that his mother had told him that she had killed the children in the orchard, when they came for peaches; that after this, on the same day, the prisoners were taken to Mr. Lawrence Sittons, and he and Green were set at liberty; that a few days after he was taken up and sent to Troy to jail; that after he got there, Mr. Chandler, the jailor, told him that he knew more about killing the children than he had told, that he had helped to kill them himself; that Mr. Chandler then told him that Judge Hunt had hung his father Ben at Bowling Green, and had come by his masters, and hung Green, and had then just taken his mother out to hang her, and that if he did not tell all about the killing the children, Judge Hunt would be there directly and hang him; that if he told they would let him off; that Mr. Chandler then put a rope on his neck, and that a man came in with a cloak on, who Mr. Chandler said, was Judge Hunt. He says the man they called Judge did not say any thing. He also says that he then told Chandler that he helped his mother to kill the children; that he and his mother carried them off into the woods. He says he also told the same story before the grand jury, after he had been sworn on the book; that the reason why he told the grand jury so was, that he had once said it, and he thought he was bound to stick to it; that neither the story he told Sitton and Hammond, nor the one which he told Chandler and the grand jury was at all true; that he told both in consequence of the threats and hanging above mentioned, and states that he knows nothing about the killing of the children.

Mrs. Florence states, that about half past two o'clock in the evening on Saturday, the 1st day of September 1838, William and Thomas Florence, sons of hers, left her house to go to William C. Prewitt's peach orchard, for the purpose of getting peaches; that they, before they started, made several requests to her for permission to go before she consented to permit them to go; that Prewitt's peach orchard was about one quarter of a mile from her husband's residence from whence her aforesaid sons started; that she noticed them some distance on the way to the orchard, as far as she could see them, at least one hundred yards from the house; that her husband William Florence, had left home on the same day to go to Auburn about two miles distant, about two o'clock, and did not return until about one hour by sun; that by this time she had become uneasy about her children, and told her husband of it, and the circumstances and facts of her children leaving; that her husband immediately started to Prewitt's orchard to see about the children, and returned without having found them. She stated that a short time before Mr. McMahon, on the evening, passed for a load of bark, the children left for the orchard; that she never saw them afterward. She states, upon cross examination, that Aaron, a negro boy belonging to her husband, was never at any time, from the time her husband left home for Auburn on that day until he returned, out of her sight more than fifteen minutes; that her husband owned a horse mill, and that some time after the children had left for the orchard, about three o'clock, not particular as to the time, Mark, a negro boy belonging to Dr. McClure, came to said mill; that he halloed for Aaron, and that Aaron came in about 10 or 15 minutes from that time and went to the mill; that she was unwell that day and, as soon as her husband had left for Auburn, and her children had left for the orchard, she called said Aaron to the house from a field where he was taking care of fodder, under his master's direction, and directed him to make a fire and bring her water, which he did accordingly; that she then sent him to the field again, and, after he had been gone some 10 or 15 minutes into the field, it was that Mark came to the mill and soon after he

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hanged; that Aaron was at the mill; that William was about eight or nine years of age; went off without hats on.

William Sitton states; that on the 4th day of September 1836 a warrant was put into my hands to apprehend Prewitt's negroes. The negroes, to wit, Ben, Green, Ellick and Fanny, the prisoner, were then under guard at Prewitt's house. I took charge of them and they were guarded that night. Next morning (Wednesday) I went over to Prewitt's and took Ellick out, and set down with him under a shade, about 60 yards from the house. Mr. Hammond came up and asked him a few questions, he said he could show us the club.

[Here the counsel for the defendant objected to any conversation of Ellick's being given in evidence. The court decided that no statement of Ellicks as to what the prisoner told him were to be given as evidence of her, the prisoner's, admissions, but that any thing stated by Ellick, which led to the discovery of facts, might be given by the way of inducement to lead to their further search into circumstances and facts.]

The witness proceeded; Ellick said he could show us where they were killed, the club they were killed with, that it was a piece of a horse yoke, that he had seen it in the orchard on Sunday. We went on where he said the club was but could not find it. Ellick said he could show us where they were taken out of the orchard; he said three rails were laid down where they were taken out. We went on and he showed us a gap on the western side of the orchard, there the rails appeared to be recently moved; he said he could show us blood where he saw it on Sunday. We went on but saw none. I then told him to go right on the way the children were carried over, and as he went, I broke the hazle bushes, intending to take another look; when he got through the hazle patch, west of the orchard, the boy Ellick then said he knew nothing further, but that his mother said she had laid them in a sink hole. We then took him back to where he said the children were taken over the fence, and then left him. I then went to the house where there were 50 or 60 men. As I went on to the house, I went by

the places where Ellick said he had seen the children, and on a close examination I found on the under side of a blade of grass, one drop of blood about as large as a pinhead, under the peach tree where the boy said they were killed, and where he said the club was. I took it up, wetted it, and found it was blood. I told the men at the house, that the children were, or I believed they were, murdered in the orchard; that I had found blood. I formed the men in a column. I did not tell them where the blood was. As soon as they got to the place where I found the drop of blood, several of the men cried out, "here is blood," "here is blood." Mr. Sanford first cried out. I went and looked at what they called blood, and did not think it was blood; it looked red, but I did not take it to be blood. Hans Smith cried out, "there was blood on the fence." On the next rail to the bottom there was a place of blood, about as wide as my finger. The rail bent over and this was rather on the under side; right in front of that about a foot from the fence there was a place that looked like it had been rooted out by the hogs, another place, about six or eight feet from that, looked like it had been rooted out by the hogs, and near where I found the first drop. These holes looked like blood mixed with the dust. I could not say it was blood. About a foot from where I found the first drop, as I went to the house, I now found blood on two other blades of grass. I did not take particular notice to this. This was on the east side of the orchard; the blood on the rail was under a peach tree. I then went on to the place where I had broke the hazle bushes in the woods, and there I found blood, at four or five places between the gap and where Ellick took us, on the hazle leaves. This I know was blood; I showed it to no one, that I recollect of. Howdershill showed me some blood he found on a leaf. The men were all formed in a column, and were frequently crying out blood in different places. I saw what others took to be blood, but I did not think it was blood; I took it to be the spots on the leaves; these were briar leaves and red on both sides. Where I found blood in the woods was about a quarter of a mile from the place they were murdered, and in a straight course from the

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blood in the orchard, to where the bodies were found.

Cross examined, stated; I and Hammond used no violence to compel the boy Ellick to confess; he made his confessions to us voluntarily. Ellick said he knew nothing but what his mother told him, after we went to the place where he said he saw the club, we could not find it. We then went to where he said he saw blood, but we saw none at that place. We then put a rope around his neck to make him tell where the sink hole was where she hid them. We choked him a little but became satisfied he knew no more about it. The witness also stated in his chief examination that at the place in the orchard where he saw blood there was a place where the blood appeared to have been attempted to be washed off the grass; the dust was spattered on the grass, and appeared to be mingled with blood; it was a dry spell of weather and the ground was dry and dusty, the peach tree at the place where the blood was on the fence had good peaches on it.

John Hammond says, that on Wednesday the 5th day of September 1838, I went to Mr. Wm. C. Prewitt's in Lincoln county. The prisoner and other negroes of Prewitt's were in custody. I saw Mr. Sitten sitting under a shade with Ellick. We took him out over a fence about 150 yards into a woods pasture. I asked Ellick to tell me the truth, I told him I had always thought him a truthful boy and wanted him to tell me the truth. He said he could show us where the children were killed, that he could show us blood on the grass. We went to the place but could see no blood. Ellick said that his mother had taken them out at a gap. He said he had seen blood on Sunday, but I saw none where he said his mother had carried them out. I did not see the club. I don't recollect of seeing any sign in the woods.— This was the day after the bodies of the children were found. The boy Ellick said he could show us the club. I first asked him if he knew who killed the children, he said no, but afterwards said his mother told him she did. As he went on to show us the place and club, he said his mother said she struck one, knocked it down and killed it; that she did not aim to kill it; she then killed the other. I saw the blood

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on the rail; it was near the ground, on the rail next the bottom, on the east side of the orchard, about 150 or 200 yards from the gap where he said they were taken out. The gap is on the west side of the orchard, not exactly in the direction to where the children were found.

Cross examined. I saw no blood till I came back out of the woods. I saw no blood in the woods or nothing that I was certain was blood. I saw what others called blood, but I did not think it was blood. Our object in taking Ellick out was to get out of the crowd. We used no violence with Ellick, till he had confessed. We then put a rope round his neck to make him tell where the sink hole was.— We choked him a little but became satisfied he knew nothing about it.

William Howdershill, a witness, says that on the day after the children were missing (on Sunday) he went with Mr. Williams to hunt for the children. We went to Prewitts orchard and I looked about some stacks for them. I expected they had been killed. In Prewitts orchard, about 200 yards from the house, on the east side of the orchard, I picked up a club, and showed it to Mr. Williams.— It was a dry hard smooth piece of hickory, 3 or 4 feet long, and turned up a little at the end. I picked it up and threw it down and told Mr. Williams it was a handy stick and explained by saying it was a handy stick to kill a child. The club was under a peach tree that had good ripe peaches upon it. I left the club there. On Wednesday I was there, and Sitton formed the men in a line in the orchard, except the the guard who guarded the negroes. Sitton told them where he had seen blood. I saw the blood on the second rail of the fence from the ground opposite to where I had seen the club on Sunday. The club was not there; I don't know what had become of it. The stick I had seen there looked like it had been part of a yoke. I saw something like blood that water had been thrown on. Saw something like blood in two or three different places. I saw blood in the woods where the boy said his mother had thrown the children. I saw the gap where the boy said his mother had taken the children out. The fence looked like it had been

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lately pulled down. The rails appeared to be moved out of their places. The blood on the rail in the orchard, where I had seen the club, looked like it had been wiped or splashed on. The rail shelves over and it was on the under side six or seven inches from the ground. I saw a place 8 or 10 feet off that looked like water and something mixed up. After I had seen the club on Sunday, I went over to Mr. Florence's, and mentioned to a good many my finding the club. I several times talked of it afterwards. The peach tree, on which the peaches were, and under which the blood was on the fence, stood near to the fence.

Doctor McClure stated. The children were found dead about $1\frac{1}{2}$ miles from Florence's, in a westwardly direction about $2\frac{1}{2}$ miles from Prewitt's orchard in a direction south of west therefrom. The children were both naked. I examined the head of William Florence the elder child.—There was a sunken place on the right side of the head running upwards; the sunken place or indentation in the skull was about two inches in length, and in the bottom of it, there was a small hair crack in the skull, about $\frac{3}{4}$ of an inch in length. I examined the head and found no other marks of violence. The body having lain under water was in a state of preservation. I could find no marks of violence on it. I do not think the blow was sufficient to produce death ordinarily. I have seen skull bones more materially injured, where the patients recovered. I think the blow would have produced insensibility. Perhaps, if the patient had not had medical or surgical assistance, such a wound would have produced inflammation, from which death would have ensued in a few days. It could not have been given with a long stick if the child had been on the ground. It might have been given if the child had been standing above the person striking or lying on the ground. It must have been given with a weapon having a smooth surface as the skin was not broken; a rough surface would have cut the skin. The other child had no mark of violence, as I could see, except several bruises or contusions on the head varying from the size of a $4\frac{1}{2}$ pence to a quarter of a dollar. The skull was not injured. The flesh had been eaten off the face, throat.

chest and arms of the child, so that no discovery could then be made. On examining the head of William Florence, the larger of the two boys, I saw a speck of blood; whether it proceeded from the nose or followed the knife I am not able to say. Such a blow, and even a much lighter one, would produce an issue of blood from the nose, or mouth. A blow that would not fracture the skull might produce blood sometimes at the mouth or ear.

William Florence a witness states, that on Saturday the 1st September 1838, I left home about 2 o'clock to go to the post office, before I left, my children asked my permission to go to Prewitt's orchard. I told them they should not go, that them negroes had threatened to kill them; and if they did go I would whale them. I then went on to Auburn, and returned about one hour by sun. So soon as I got home, or within thirty or forty yards of the house, I saw my wife coming out, and she asked me if I had seen any thing of the two children; I told her no, and asked her where they were. She stated that they had left home about 30 minutes after I did, and said they were going to the orchard to get some peaches. I got off my horse and threw my bridle over a stake, and started directly to the orchard. I went to it but did not see my children. I then went to Mr. Prewitt's house and called out the prisoner Fanny. She poked her head around the house, and I asked her if she had seen my children? She said she had not, and then drew back. I called her again and then asked her if she had been to the orchard that day? She said she had not. I asked for Ellick; she said he was down the hill. I told her to call him and ask him if he had seen them. She did so, and said that he said that he had not. By this time Ellick came running up the hill, and came within a few steps of me and stopped. He looked as wild as a deer. I then asked him if he had seen my children? He answered that he had not. I then asked him where he had been ever since about dinner time of day? He answered that he had been up about the orchard and about the house. I then discovered from their deportment that my children had been murdered by them. I then went home and told my wife so. I had

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been living near Mr. Prewitt's about 4 years, and have been acquainted with the prisoner Fanny ever since. I had frequently been at Mr. Prewitt's and enquired of her for Mr. Prewitt and she would come out and stand and talk to me. On this occasion, she poked her head around the corner of the house. On this occasion she looked so different from what she always did, that I felt satisfied she committed the murder or knew who did do it. Mr. Prewitt was from home, and no person there except the said Fanny, Ellick and some children. On the next day, Sunday, I saw the stick which Howdershill saw, before Howdershill saw it.— I, on Wednesday, saw the blood on the rail, and the grass. I do not know except from information given by my children, that Fanny had made any threats against my children. I saw what I knew to be blood in one place. There were about 70 or 80 persons in the woods scattered about one hundred yards, and one would cry out "here is blood," and another would cry out "here is blood," but I knew there was not blood in some places; they said there was. I saw nothing on Sunday except the stick that I have spoken of.— The place where the children were found is about $2\frac{1}{2}$ miles from the orchard.

On cross examination he said, I do not know whether she, Fanny, was washing her clothes or not, nor how she was clothed that evening, for I did not see her body. I saw a kettle or pot with a little fire under it, which looked like some negroes had been washing or were washing. On cross examination, witness was asked if the agitation and alarm which the prisoner manifested when he (witness) accosted her, and she answered him as above stated, were not produced by his (witnesses) excitement? To which he replied, no! that he was not excited till after he saw her (prisoner); that he expected to find his children there and expected she was alarmed at the sight of him.

Elizabeth Howdershill, a witness, stated, that she went over to Mr. William Florences on Sunday morning, and found Mrs. Ware there, and we proposed to go to Mr. Prewitt's orchard, and get some peaches. We went on to the house and asked the prisoner, Fanny, if there were any

good peaches in the orchard. She said there were none, OCT. TERM
 for she had been in the orchard the evening before, and there **1839.**
 were none. I told her that I expected that people who had
 taken them and eaten them, would eat them no more. She
 then stated that Mr. Florence had accused her children of
 killing his. I was not acquainted with her, never saw her
 before; she looked to be in great trouble; had nothing to
 say; seemed to be mortified; she just sat down and said no-
 thing; seemed to be condemned right off. Fanny,
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On cross examination, she stated, I saw flies near the spot
 where the gentlemen saw the sign. The flies were green
 flies; there were a great many flies about the spot. I knew
 that the flies were on the spot where the sign had been seen,
 because they (the people) told me so. When I saw the
 flies we got scared, and ran away. This orchard was a place
 to which the people of the neighborhood generally went to
 get fruit. Shortly after we returned from the orchard, Mr.
 Florence came, and said he suspected Prewitt's negroes.

Mrs. Ware says; I went with Mrs. Howdershill to Mr.
 Prewitt's on Sunday morning to get some peaches. We
 asked Fanny, the prisoner, if there were good peaches in
 the orchard? She said, no; that she had been in the orch-
 ard the evening before, and there was none fit to eat; they
 had been eaten by them that would eat them no more.—
 That Mr. Florence had accused her (Fanny's) children of
 killing his, and said no more. I saw the flies spoken of by
 Mrs. Howdershill. I did not notice Fanny much; her face
 was tied up, and she said she had the toothache. I and Mrs.
 Howdershill went to Prewitt's in the forepart of the day.—
 We had been up all night. I do not know whether Mrs.
 Howdershill spent the night before at Mr. Florence's or not.
 I asked Mrs. Howdershill if she would take a walk. We
 passed about in different directions in the orchard, thinking
 that we might find the children but saw nothing of them.—
 There were two negroes there eating dinner when we got
 there.

Burton Parmer, a witness, says; I was the first person
 who found the children. There was five or six hunting, I
 discovered buzzards and told the company, who were out

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with me, that we would stop and see what they were doing. I saw one fly up out of the creek. I rode to the bank; it was high. I went down to the hole of water; I saw a bunch of hair, a little lump; I also saw an arm out of the water, eaten by the buzzards. This was the smallest boy, Thomas. He was mostly covered. The largest boy, William, was entirely covered. There was a large rock on the hip bone that appeared to be put on to hold him down, till gravel and sand were put on. The largest was near the bank closely fitted to the bank, the smallest next to him. The water in the hole was about 18 inches deep. The water had fallen some and appeared to be falling. There were several rocks laid on the children. I could see where they had been pulled out of the clay bank, from the shape of the rocks, and the holes from which they were taken. They appeared to be put on by design not by accident. The rocks were taken out of the second bank. They were found one and a half hours by sun, on Tuesday. I told Mr. Sitton where they were found, near the corner of an old place. Sitton knew the situation of the place better than I did. The children were entirely naked, as to clothing when found. The place was not over 100 yards from the Jefferson road. I did not search for their clothes, nor do I believe there was any search made. It was talked of but not done that I know of.

The court instructed the jury the same, in substance, contained in the first instruction after the close of the evidence, to wit, that statements made by witnesses on the trial of this cause of what Ellick, another witness, heretofore said to them (said witnesses) in relation to declarations of the defendant to him, said Ellick, are not legal evidence, in this cause against the defendant; and that they should wholly disregard such evidence in making their verdict in this cause.

Defendants Evidence.

Robert M'Mahill, a witness, states that, on Saturday the first day of September 1838; he was engaged hauling tan-bark for a Mr. Read; that he passed the house of Mr. Florence, also the house and orchard of Mr. Prewitt; that he

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usually hauled three loads a day; that in the early part of the day his own children went with him to Mr. Florence's, and as he returned with his second load, his children left Florence's and went to Prewitt's orchard; that he went on to the orchard with the second load, and when he got to Read's, they had eaten their dinner; that he (witness) ate his dinner, and immediately returned briskly by the orchard where he saw no one either in the orchard, or about Prewitt's house, which was 150 or 200 yards from the road; the road run near the fence of the field in which the orchard was; about 100 or 150 yards from the orchard; this was in the afternoon, but he is unable to say pecisely at what time. He went on by Mr. Florences, which was about one quarter of a mile farther, on his road, than the orchard. As he passed Florence's, he saw Mr. Florence's two little children, William and Thomas. They inquired of him, if his children were at Mr. Prewitt's orchard; he told them, they were not. The boys said they were, and that they would go there. They started on towards the orchard. The last he saw of them they were going on, and were 50 or 60 yards from the house near the mouth of Mr. Florence's lane. He went on a mile or two and got his bark and returned.— He was hauling in a small two horse wagon, and went briskly. When he returned, there was some one grinding, at Mr. Florence's mill, he thinks, one hour and a half by sun. As he passed, Mrs. Florence requested him, if he saw her children at the orchard, to tell them to come home. He went on by the orchard, but did not see them. As he passed, Prewitt's place, below the house, he saw three little negroes, coming up the branch out of the woods, and near the road he travelled, and which was 150 or 200 yards from Prewitt's house. One of the boys appeared to be 13 or 14 years of age. He called to them and inquired if they had seen Mr. Florence's children that evening? They answered that they had not. Where he last saw Mr. Florence's children, when he went out they were in the lane 40 or 50 yards on their way to the orchard. I was with the men in the orchard the day after the children were found. I saw

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what was by some thought to be blood. It was red spots on leaves which I did not think was blood.

Mark, a slave, a witness, says; I went on the Saturday evening, on which Mr. Florence's children were missing, to Mr. Florence's mill. I started about two o'clock in the evening. I passed Mr. Prewitt's orchard, on my way to the mill, and travelled the road from there to the mill on which the children must have gone, if they travelled any road to the orchard. I did not see them on the road nor in the orchard. When I got to the mill I saw nothing of Aaron, Mr. Florence's slave. I rode up and asked for him, and was told that he was in the field getting fodder. I then called him several times but he did not come. I then hitched my horses to the mill and attempted to grind my corn, but could not get along with it, because they had been grinding wheat in the mill, and I could not drive my horses and set the mill. Aaron did not come according to my judgment for one hour and a half after I got there. I saw Mr. M'Mahill, after he returned with his load of bark, and think my corn was nearly ground out at the time. When Aaron came I asked him where he had been? He said he had started to Mr. Sitton's orchard to get some apples. I asked him if he heard me call him? He answered that he did, and turned back before he got there. I think that Lawrence Sitton's orchard, to which he said he started, is not more than a quarter of a mile from Mr. Florence's. When I was about to start home, Mrs. Florence requested me to tell her children, if I saw them to come home. As I passed Mr. Prewitt's orchard, I looked over it, but saw nothing of her children. I saw a boy coming into the orchard, which I took to be a son of Mr. Teague. He was too large for William Florence. After I passed the orchard and got down to the branch nearly opposite to Mr. Prewitt's house, I saw Ellick and some negro children at play in the road. I asked Ellick, if he had seen Mr. Florence's children? and he told me he had not. Lawrence Sitton's orchard is a contrary direction from Florence's from the direction of Prewitts orchard. I did not see Mr. M'Mahill pass out after tan bark, after I got there. I think he came back in about an hour after I

got there and before I got done grinding. I went home from the mill before Mr. Florence came home, I think about three quarters of an hour by sun.

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William Whitesides, a witness, says; I was not present when the slaves of William C. Prewitt were arrested, but went to the company on Wednesday morning, the day after they were arrested, to look for blood. I saw the holes which had been rooted by the hogs, and saw what some thought was blood about them, but could not tell what it was; do not believe it was blood. I did not go to examine the rail on which blood was seen. I then went with the company to the woods to examine for blood. We were formed in a line and moved about towards the west. I was at the extreme left of the line. Many men in the line frequently cried out "here is blood," but it was not. I was in the orchard on Monday, and on Monday my nose bled much, but whether or not it bled when in the orchard I do not recollect. I was also in the same woods, in which the blood was found, on Monday, the day on which my nose bled, but do not know that I passed over the same ground or not, or whether or not it bled while I was in the woods. I do not think that I was as far in the woods on Monday as the place at which they said they saw blood. It bled excessively on Monday, but know that the blood on the rail did not come from my nose; my saddle and blanket and horses neck were covered with blood which came from my nose. When in the woods, I went to examine for the sink hole, found one about half a mile from Prewitt's on a line from where they saw blood in the woods, with the place where the children were found. I examined the sink hole, but could find no signs of any thing having been in it.

Robert Prewitt, a witness, says; I had the charge of the farm and negroes of William Prewitt during his absence. I have often taken down the fence at the gap, where the children are supposed to have been taken out, and I was generally at the farm at least twice a week, during his absence. I was shown the place where the boys were found. I altered some pigs in the pasture near the house some few days before the children were missing, perhaps 20 or 30 in

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number. The fence was open from the pasture, near the house, into the orchard. Two or three days after the children were found, Mr. Sandford showed me a rail in the orchard fence on which there was blood, at the place where the children were supposed to have been killed. It was blood I have no doubt. The splotch on the grass I supposed to be the urine from some animal, which had fed on clover. The place rooted up by the hogs looked like a place where hogs had been salted. I saw no blood there. I salted hogs in the field near the house. I conversed with Mr. Sitton some time afterwards, and Sitton told me that he at first thought he saw blood in the woods, at the place described by him, but that he had become satisfied that he was mistaken and that there was no blood in the woods.

Cross examined. I am the uncle of the owner of the slaves. I altered the pigs some time in the week before the one in which the boys were missing. It was a dry time there had been no rain for same time. I could not tell where the rooting had been done. I saw no other places rooted than the two mentioned by the witnesses, one of which was just under the blood on the fence, the other 8 or 9 feet from that. Seven or 8 yards from the peach tree, I saw a splotch. It rather ran down hill, this I did not think blood, but it looked like clover urine. The clover was eaten out at that time. He had not pulled the gap down since the fall before the supposed murder.

Thadeus Sanford, a witness, sworn on the part of the defendant, says; I saw a place on the fence, a red splotch of blood, about $1\frac{1}{2}$ inches in breadth and 3 inches long, running up from the bottom of the rail. I saw blood in no other place. I went into the woods and examined leaves, on which there was said to be blood. I did not think it blood; the place on the fence had the appearance of blood. The urine of hogs, fed on red oak mast, looks red, but this was not mast season; horse urine generally kills grass. The gentlemen in every direction in the woods were crying blood I did not deem it blood. There was great excitement. That on the fence over the hole had the appearance of a hog having rooted it on with his nose. I went with my father

and found no hole but this, and one in the grass. There were hogs in the field. There was no water in that field.

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Cross examined. I know of two sink holes in the direction from the peach tree to where the boys were found, in brushy places. I went into them but saw nothing.

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Green, a slave of William C. Prewitt, says; that, at the time the children were missing, he lived at Robert Prewitt's; on Saturday the day the children were missing, he was all day at R. Prewitt's until after sun down; he came up to Wm. C. Prewitt's after sun down, and staid a short time; Ben, another slave of his master, was there at the house; that Ben had been at work that day for Mr. Sanford, and had come home; witness staid a short time and returned to R. Prewitt's, where he staid all night; next morning he returned, and he and Ben went out to hunt the children in company with others; they separated and hunted for some time, and came home where he found Ben there before him.

The defendant here closed his evidence. Plaintiff's rebutting evidence. William Florence. I am the owner of a horse mill, it will take from $\frac{3}{4}$ of an hour to 2 hours, according to the team and condition of the mill, to grind two bushels. The place where M'Mahill lives is from 1 to 2 miles from my house. M'Mahill rather weak and decrepid. The ground is sink hole from where the boys were said to be taken out of the field to where they were found. The work left the boy Aaron to do, would take two hours; it was to bring fodder together. Aaron is a boy of good character; I raised him: he had no grudge against the children. The work, left him, was done, as the boy told him, and as he found to be true on Monday morning. Sitton's orchard is 300 yards from Florence's field in an opposite direction from Prewitt's. Witness left for Auburn at 2 o'clock.

William Sitton, called again. says; he did tell Robert Prewitt that he had found blood in the woods, and that he swore, before the justice that he saw blood in the woods; the column in the woods was 70 yards long, he in the centre; Smith and Howdershill with him on the trail; Howdershill is an old hunter. We examined together for blood, and

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Joseph Howdershill sworn, says; the fence at the gap, where the children are supposed to be taken out, appeared to have been fresh removed; and this was all the evidence given in the cause.

The defendant by her counsel then moved the court to instruct the jury as follows: "State of Missouri vs. Fanny a slave, an indictment for murder of William Florence. The prisoner by her counsel, moves the court to instruct the jury.

1st. That statements made by witnesses on the trial of this cause of what Ellick, another witness, heretofore said to them (said witnesses) in relation to declarations of the defendant to him said Ellick are not legal evidence in this cause against the defendant, and that they should wholly disregard all such statements in making up their verdict in their cause.

2nd. That no evidence given in this cause of confessions of the defendant, unless such confessions, were made directly by the prisoner to the witnesses giving the evidence in their hearing, should be regarded by the jury in making up their verdict in this cause.

3rd. That no evidence given in this cause of threats made by the defendant, unless such threats were made directly to witnesses giving the evidence or in their hearing, should be considered by them in making up their verdict in this cause.

4th. That unless the evidence offered in this cause, apart from the evidence decided by the court to be illegal evidence, should satisfy their minds of the guilt of the defendant beyond a reasonable doubt, that they should find the defendant not guilty.

5th. That if they entertain reasonable doubt on any material fact, necessary to make out the guilt of the defendant they should find the defendant not guilty.

The prisoner's counsel presents the following points for the consideration of this court.

1st. The circuit court of Lincoln county erred in grant-

ing a change of venue upon the application of Wm. C. Prewitt, the master of the prisoner, and the circuit court of Warren gained no jurisdiction by said order.

2nd. The circuit court of Warren erred in passing sentence of death on said prisoner, such sentence being without warrant of law.

3rd. The circuit court of Warren erred in overruling the motion for a new trial.

Tompkins Judge.

1st. the change of venue from Lincoln county to Warren being made on the petition of the master and owner of Fanny, that error was not in my opinion cured by her appearance and subsequent defence before the circuit court of Warren county. She was a slave and it is only in the presence of the court that the law can regard her as a free agent. In a capital case I do not believe that the assent of a free man, even, ought to be implied to a change of venue, but he ought to petition in person as required by law.

2nd. It is contended by the prisoner's counsel, that capital punishment cannot now be inflicted on a slave, and that the first section of the second article of the act concerning crimes and their punishment is, so far as slaves are concerned, impliedly repealed by the second section of the act amendatory of the act concerning crimes &c. approved February 6, 1836, see p. 60 of the session act. By the first section of this amendatory act, the thirty-first, thirty-second, thirty-third and thirty-fourth sections of the ninth article of the act concerning crimes &c. above mentioned are repealed, and by the second and third sections of the amendatory act it is provided, that when any slave shall be convicted of a felony, such slave may be punished with stripes to which may be added transportation. It is certain that murder in the first degree of which the prisoner was convicted, is a felony. The sections of the ninth article, above mentioned as repealed, provided for the punishment of slaves convicted of a felony, for which they were sentenced to the penitentiary; it is then a reasonable presumption that the second and third sections of the amendatory act were intended to

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A change of venue cannot be granted on application of the owner of a slave indicted for murder. The slave should petition in person for such change. The 2nd & 3rd sections of the act of February 6th 1836 concerning crimes & punishments, providing that any slave thereafter convicted of a felony &c. shall be punished by whipping &c. were intended only to substitute a punishment in lieu of that prescribed in the repealed sections; leaving slaves still punishable with death for murder in the first degree.

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Were there room for doubt on this subject, the 27th sect. of the 3rd article of the state constitution, providing that a slave convicted of a capital offence shall suffer the same degree of punishment, and no other, than would be inflicted on a free white person for the same offence, settles that doubt.

No statute shall be construed in such manner as to be inconvenient or against reason.

Evidence of what a witness declared on a former occasion respecting the guilt of a prisoner on trial, is not admissible to prove the guilt of the prisoner.

substitute a punishment in lieu of that prescribed in the repealed sections. It is not then reasonable, to believe that the crime to be punished under the substituted law was any other than that furnished under the repealed law. Why should the legislature wish to punish a slave, for the same offence more lightly than a free man? for a free man is still punished with death for murder in the first degree. No statute shall be construed in such a manner as to be inconvenient or against reason. 4 Bac. ab. 652. Were there room for doubt, on this subject, our constitution settles that doubt. The 27th section of the 3rd article of that instrument provides that a slave, convicted of a capital offence, shall suffer the same degree of punishment and no other than would be inflicted on a free white person for the same offence. The framers of the constitution anticipated probably that the legislative power might prescribe a heavier punishment to be inflicted on a slave than on a free white person guilty of a capital offence. This point then in my opinion must be decided against the prisoner.

3rd. The testimony of Sitton, so far as it details the declaration of Ellick, is altogether inadmissible against the prisoner. Had Ellick been himself on trial any confessions extorted from him by improper means, might have been given in evidence against himself if they led to the discovery of evidences of guilt.

4th. Abstracting from the evidence on the record the declarations extorted from the boy Ellick, there does not in my opinion remain any evidence to justify a jury in finding the prisoner guilty. The judgment of the circuit court ought then in my opinion to be reversed, for these reasons.

1st. Because the prisoner did not petition for a change of venue.

2nd. Because Sitton's testimony of the declarations of Ellick were suffered to go to the jury.

3rd. Because that court, if the cause had been properly before it, ought to have granted a new trial.

The cause ought in my opinion to be remanded from the circuit court of Warren to that of Lincoln county.

NOTE.—The president of the court undertook to write

this opinion; and I wrote the notes printed under my name, expecting that the court would not concur in opinion on all the points made and discussed at the bar. The court however thought proper to adopt my notes as their opinion and as such they are printed. The statement of the case was not made by me but by the clerk.

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FENTON V RUSSELL & LINDLAY.

Where there is a judgment of non suit rendered, in a suit before a justice of the peace, and that judgment is set aside, and a new trial granted, and judgment again rendered against plaintiffs, an appeal from such judgment may be taken, although more than ten days may have elapsed since the rendition of the judgment of non suit, and it makes no difference whether the suit is founded on an instrument of writing or not.

Appeal from the Circuit Court of Audrian County.

Abernathy for Appellant.

1st. That the court erred in not dismissing said appeal as said appeal was not taken within ten days after the judgment of non-suit, and for costs. See revised statutes, page 369, section 3, p. 359, 1, 2, & 3.

2nd. That the non suit in this case was wrong.

Opinion of the court delivered by Tompkins Judge.

Russell and Lindley commenced an action on a promissory note before a justice of the peace, in the County of Audrain, against James E. Fenton; judgment being given against them, they appealed to the circuit court. That court gave judgment for the appellants. To reverse that judgment Fenton appeals to this court. The justices summons was returned on the 26th day of January 1839, when, as the justice shows, the defendant appeared in person, and the plaintiffs by agent. This is a copy of the note sued on, "Thirty days after date I promise to pay to Russel & Lindley or order, fifty nine dollars and fifty eight cents, &c." On the trial before the justice, the agent of the plaintiff was required by the defendant to prove that John Russell and

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Giles Lindley, in whose behalf the summons was issued, were the persons to whom the note sued on was made.—

This, it is stated in the justices return, the agent being unable to prove, the justice, on the defendants motion, entered a judgment of non suit against the plaintiffs. On the fifth day of February then next, the justice, on the motion of the plaintiffs, set aside the judgment of non suit, and granted them a new trial. On this trial judgment being again given against the plaintiffs, they appealed to the circuit court as above stated. The defendant before the justice of the peace, appellant here, moved the circuit court to dismiss the cause, because the appeal was not taken in time. The last trial before the justice was on the 23rd day of February, and on that day the appeal was taken. But it is contended that the justice had no authority to set aside this judgment by non suit, and as the statute requires the appeal to be taken within ten days after the judgment, and as this appeal was taken more than ten days after the first trial, it was too late. The statute allows the justice of the peace to set aside a judgment of non suit on terms, see 3 section of 5th article of the act establishing justice's courts, page 359, of the digest of 1835. But it is contended that the judgment of non suit must be rendered in pursuance of the first section of the said fifth article, when the plaintiff fails to appear, and his demand is not founded on an instrument of writing by which it is liquidated, but on an unliquidated demand. It is not so apparent why the legislature should incline to favor a plaintiff who does not appear on the day of trial more than one who does appear. He who does appear and uses his best endeavors to try his cause is certainly more deserving of favor, than he who does not appear; yet there is no doubt but the plaintiff, if he had failed to appear, and his demand had been unliquidated, would have had a right under the statute to have his judgment of non suit set aside. This cause was argued ex parte, and therefore I may not perhaps be so well informed of the law, but the right and justice of the case is not difficult to be perceived. The defendant does not pretend that the demand is unjust, and the return of the justice shows that it was on his motion the judgment

of non suit was rendered: the object of the statute being to decide small causes before the justices of the peace, in the most equitable and expeditious manner, without oppressing the suitors with the trouble and expense of long and formal suit. It seems not at all improper to sentence the defendant

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now to pay that debt, which he would not attempt to disprove in the circuit court. It may be added that if the justice of the peace rendered a wrong judgment, it was done on the motion of the defendant himself. But I believe the judgment of non suit rendered by the justice and the setting of it aside afterwards was well enough. The judgment of the circuit court is therefore affirmed.

Where there is a judgment of non suit rendered in a suit before a justice of the peace, and that judgment is set aside, and a new trial

granted, and judgment rendered against plaintiffs, an appeal from such judgment may be taken, although more than ten days may have elapsed since the rendition of the judgment of non suit, and it makes no difference whether the suit is founded on an instrument of writing or not.

WILCOX v. POWERS *Adm'r. of Poor.*

Appeal from the Circuit Court of Pike County.

An administrator may avail himself of an equitable defence to a demand, presented to the county court for allowance against a deceased estate.

Wells for Appellant.

First, The failure of the clock to perform is no defence at law to the note. The party would be left to his action on the warranty. One cause of action cannot be set off against another

Second, In equity the failure of the warranty could only be a defence to the note in case of the insolvency of the warrantor or under such circumstances as that an action on the warranty would be unavailing.

Third, Admitting the equity jurisdiction of the county court, the defence is not made out.

Opinion of the court delivered by Napton Judge.

Wilcox presented to the county court of Pike county, for allowance against the estate of Emanuel Poor deceased, a note executed by said Poor, in his life time, to one William Alton for \$38. On the back of the note was the following

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endorsement: "This note is given for a clock which is warranted to be a good time piece for six months. If it should fail said Poor is to be furnished with one that will. (Signed) Wm. Alton." The execution of the note by Poor and of the warranty by Alton were admitted. A son of the deceased proved that the clock did keep good time about five months with a few occasional stoppages, at the expiration of which time the clock stopped, on account of the breaking of a chord attached to one of the weights, and that the alarm did not go off as well as could have been desired, for what cause witness could not say; that some time in the fall of the same year, after the expiration of the six months during which the clock was warranted to run well, Wilcox called at his fathers house, remained all night and repaired the clock by putting in a new chord; that since that time the clock has run tolerably well, except a few occasional stoppages; and that some time after said note became due, some one called on his father for payment, but his father refused, saying that Alton might sue on it. This was in substance all the evidence. The county court refused to allow the note, from which decision Wilcox appealed to the circuit court. The circuit court affirmed the opinion of the county court, and the plaintiff appeals to this court. According

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to the decision of this court, in the case of Davis vs. Cleveland, 4 Mo. Rep. 206, the county court committed no error in allowing the defendant to avail himself of an equitable defence; the only question is, whether the circuit court exercised its discretion soundly in affirming the judgment of the county court, upon the facts, thereby depriving the appellant of the benefit of a new trial, Rev. Co. § 35, p. 63-48. There was not sufficient proof of the failure of the warranty, for the defendant did not show any facts from which an inference could be drawn that the clock was not a good time piece. True it stopped when the chord attached to the weight broke, and it occasionally stopped after the chord was mended, but whether these stoppages were owing to the negligence or carelessness of the owner in failing to wind it up at suitable periods, does not appear. No deficiency in the mechanism was shown, or that it was not well

adapted to the ends it promised to accomplish. There is such an entire absence of testimony on these points as well warranted, in our estimation, a new trial. Judgment reversed and cause remanded.

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THE STATE V. MITCHELL.

Error to the Circuit Court of Lewis county.

If the offence charged in the indictment be described in the words of the statute, it is sufficient.

Abernathy for the State.

It is not necessary to aver the names of the games played, see Revised Statutes page 208, -17th section, 8th article same act. Pirtles digest vol. 1, pages 517 and 518. 3 J. J. Marshall's report 133 Montu *vs.* Commonwealth of Kentucky.

Wright for Defendant.

The indictment being founded on the statute, it is necessary that the charge contain every element or constituent of the offence, and an expanded definition of the offence must be made 15th sec. R. C., p. 207.

Opinion of the court delivered by Tompkins Judge.

Mitchell was indicted for permitting gaming in his house, and the indictment being quashed on motion of the defendant, the State prosecutes this appeal to reverse the judgment of the circuit court. The indictment is framed on the 17th section of the 8th article of the act concerning crimes and their punishments page 208, of the digest of 1835, and charges that Mitchell did suffer a certain gambling device, commonly called cards, adapted, devised and designed for the purpose of playing at games of chance for money and property, to be used in a certain house of which he the said Thomas, then and there had possession; and that the said Thomas L. Mitchell, then and there, in the said house in his possession as aforesaid, knowingly, wilfully and unlawfully, did suffer games of chance to be played at and upon said gambling device for money and property upon which said games of chance so played, money was then and there bet, won and lost &c. The section above referred to, and on

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If the offence charged in the indictment be described in the words of the statute, it is sufficient.

which this indictment is framed, is in these words, viz: "Every person who shall suffer or permit any gaming table, bank or device prohibited by the preceding provisions to be set up, or used for the purpose of gaming, in any house, building, shed, booth, &c. to him belonging or by him occupied, or of which he hath at the time the possession or control, shall on conviction be guilty of a misdemeanor &c." It has often been decided, that if the offence, in the indictment charged, be described in the words of the statute it is good. See *Vaughn vs. the State*, page 335, of the 4th volume of *Missouri Decisions*, and the *State vs. Comfort*, page 358, of the 5th volume. The circuit court then seems to have committed error in quashing the indictment. Its judgment is therefore reversed, and the cause will be remanded to be proceeded in conformably to this opinion.

DAVIS V. COOPER.

Appeal from the Circuit Court of Warren county.

1. In an action of trespass against an officer it is not necessary to declare against him in his official capacity.
2. Declaration in trespass—plea, that the acts charged &c. were done under the authority of an execution delivered to defendant as deputy sheriff &c. Replication, that plaintiff had paid the full amount of the execution, and that defendant acknowledged full satisfaction of the execution by giving his receipts therefor, &c. *Held*, that the replication was bad in not averring that plaintiff had paid and satisfied the execution &c. and in not stating how much money he had paid, and further, in not averring that the trespass was committed after the payment of the money due on the execution.
3. But the defendant having withdrawn his demurrer to the replication and the issue joined having been found against him, the defect in the replication is cured by the verdict.
4. Evidence which has a tendency to disprove the facts which the other party is endeavoring to establish is admissible, particularly if such evidence can be drawn from the witness of the other party.
5. An execution and venditioni exponas, are a sufficient justification of a sheriff in an action of trespass against him for levying upon and selling plaintiffs property, but if the sheriff wishes to offer the whole record in evidence there is no good reason why the court should refuse to permit him to do so.

*Wells and Campbell for Appellant.*OCTOBER TERM
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1st. The court erred in refusing to permit the defendant to introduce the record of the case of John Davis vs. Spencer Cooper, as evidence to the jury.

2nd. The circuit court erred in refusing to permit the defendant to introduce, as evidence, the execution and writ of venditioni exponas in said cause and the return thereon.

3rd. The circuit court erred in refusing to permit the defendant to introduce evidence to prove his general good conduct and character as deputy sheriff.

4th. The circuit court erred in refusing to permit the defendant to propound to Alexander Cooper two questions proposed and overruled by the court, as saved in the bill of exceptions.

5th. The circuit court erred in refusing to grant a new trial in the cause, for the reasons assigned in defendant's motion.

6th. The circuit court erred in refusing to sustain the motion of defendant in arrest of judgment.

7th. The circuit court erred, in rendering judgment for plaintiff. See Tucker's Commentaries, vol. 2, p. 371. 1st Cranch 136, do do vol. 292, book 3. 1 Robinson's practice 342. See second Starkie, pages 365, 368, 369, note 3rd, Starkie 1744-6-7. 1 Starkie Ev. p. 132. See American digest p. 374, and 346. 1 Mass. T. R. 530. 3 Cranch 307, Hall's digest page 500, Hardin's Rep. page 362, 19th Johns. Rep. 39. Rob. prac. 342.

Jameson and Dryden for Appellee.

1st. The plaintiff did not sue defendant as an officer, and that, as an officer he justified his acts as charged.

2nd. He could not make evidence for himself. 7th Johnson's Rep's 426. 15th do. 443.

3rd. The only issue in this cause was the issue on the special replication

4th. The defendant cannot, in action of trespass, or in any other action, unless his character is put directly in issue, go into proof of his general good character. 2nd Starkie, title character, page 2, 214-15-16 and 17, and the notes here referred to.

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5th. The court below did not err, in not requiring Alexander Cooper to answer the two questions mentioned in the assignment of error.

Opinion of the court delivered by Tompkins Judge.

Cooper brought an action of trespass, in the circuit court of Warren county, against Davis and there obtained a judgment against him, to reverse which Davis prosecutes this appeal. Davis pleaded, first, the general issue, to which the plaintiff replied. 2nd. Davis pleaded that the several acts charged in the declaration to be trespasses were done by him, under the authority of an execution then delivered to him, as deputy sheriff of said county of Warren.—Cooper rejoined, averring that he had paid the full amount of said execution, and that the defendant acknowledged full satisfaction of said execution by giving his receipt therefor, &c. To this rejoinder the defendant demurred and his demurrer being overruled, he withdrew it, and an issue of fact being made up, they proceed to trial. The defendant moved in arrest of judgment and his motion was over ruled. A witness, sister of Cooper the plaintiff in the circuit court, appellee here, states, that on the eleventh day of July in the year 1838, a few days before the commission of the trespass charged in the declaration, that Davis, the appellant, came to the house of the appellee, her brother; he did not come into the house, but spoke to the appellee outside of the house; the appellant had then the execution: the appellee came into the house for his money and went out and he and the appellant were talking together in a passage, at the end of the house; that the witness lay on the bed and looked out of a crack near where they were talking; that the defendant was sitting down, close to the end of the house that the appellee, and plaintiff below, was standing up close to him, that she heard the appellee say "now we are even" and the appellant said "well" and then he went away; she did not see any money paid or received, but she heard money rattling and saw their arms passing backwards and forwards, and she thought that when the appellant went away he was satisfied, as she heard no disturbance or noise; that some time after, on the same day the appellant came back

with three men; that the appellee met them at the fence, a short distance from the house, where they had some angry talk; which she did not hear. On cross examination, she stated that she looked through the crack because she wanted to see what they were doing, that both the appellee and appellant appeared to be in good humour when they were talking in the passage, that she did not know how much money the plaintiff took out; she had seen it in the chest, but did not count it, that the plaintiff (appellee) and his cousin had counted it some time before, soon after the execution had issued, and that they said there were sixty dollars; that after the appellant went away, the appellee came in with the receipt and read it to her, it was a receipt in full, that the appellee did not say any thing to her about the receipt, and that he did not have any conversation with her on the subject; that she did not inform her brother that she had been looking through the crack, and that there has not been any conversation between them on the subject betwixt that time, and the time when the appellant came back with the three men; that the appellant and appellee were talking together, the first time the appellant came, about an hour and a half; that she was three times at the crack, and might have spent about half an hour there, that they conversed about many things of which she recollected nothing except what was above related. The taking and sale of the property in the declaration mentioned was proved, and the receipt being lost, evidence was given of it, by producing a copy and proving the hand writing of the appellant, it was for forty-one dollars and 98 cents in money, and thirteen dollars and 49 cents in receipts of certain persons, to whom probably costs had been paid by appellee. The appellee then introduced Alexander Cooper, his brother, to prove, that he the appellee was a farmer and had then a crop, and had but one other horse; and that unhealthy, with other circumstances in aggravation of damages; this witness purchased the property. On cross examination, the witness was asked whether the appellee had not furnished him the money to buy this property, and whether the appellee had not requested him to purchase it. These questions the cir-

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cuit court decided should not be answered. The appellant then offered in evidence the record of the judgment on which the execution was issued, and under which he acted, but on motion of the appellee it was rejected. He then offered in evidence the execution and venditioni exponas issued in the cause; they were also rejected. On this execution was a special return, that the appellee had paid ten dollars in money and thirteen dollars and 49½ cents in receipts, the same as those mentioned before in the receipt given in evidence by the appellee, and that having written a receipt for the whole sum due on the execution, the appellee got possession of it to see if it was sufficient, and retained it paying only the sum of ten dollars and the receipts as above mentioned. A witness introduced on the part of the appellant, stated that in July 1838, he and two others went with the appellant to the house of the appellee; that at the foot of the field they saw a son of the appellee, who, when he saw them, ran for the house, and was there when they came up; that as they approached the house, they saw the plaintiff come out with his gun, and that he met them at the fence a short distance from the house; that the appellant told the appellee he had come to try to settle that dispute between them; that the appellee got angry, and the appellant told him he wanted the balance of the money due on the execution; the appellee said he had paid him all he owed him, and had his receipt for it; that the appellant said he had his receipt but he had only shown it to him and he had kept it, and had paid him only ten dollars; the appellee replied that he had paid him all he owed him; that the appellant then asked him, how much he had paid; but that he did not say, and repeated that he had paid him all he owed him, and said he was going to hunt squirrels; the two other persons testified to the same purpose, with this addition that one of them said it was on the 11th day of July 1838, the day on which the plaintiff's witness had stated it to be. The second of these three witnesses, who were present at the interview betwixt Davis and Cooper, stated that Davis repeatedly asked Cooper to state how much he had paid, but that Cooper did not state how much he had paid, but said he had paid all he ow-

ed, and the receipt would show; that the appellee ordered the appellant off, cursing him; that the appellant asked him to show the receipt which was not done; that Cooper stated he could prove the payment of the money by his sister, who had been lying on the bed and looking through a crack, and had seen him pay the money. Other angry and idle words were said to have been spoken by the appellee. One of these witnesses states that he and another went next day to Cooper's house, at Davis' request, and saw a crack about an inch and a half wide apparently newly made. Several witnesses, introduced by the appellant, testified that they had heard Cooper say that the judgment should never do John Davis, the plaintiff in that judgment, any good; and one stated that he had said, he would pay it to Hay's the sheriff, but not to James Davis his deputy. Davis offered evidence of his character, which the circuit court refused to admit. The defendant moved for a new trial, because, first the verdict was against law and evidence. 2nd. The court refused to admit the defendant to introduce proper and legal evidence. It may be proper here to observe that exceptions were taken to the decision of the court in refusing to admit the evidence offered by the defendant. The reasons in arrest of judgment are, 1st. The declaration was bad. 2nd. The replication to the plaintiff's second plea was bad.

The appellant contends that the judgment ought to be arrested.

1st. Because the declaration should have been against him as deputy sheriff. In the total absence of books to furnish authority, I am reduced to the necessity of depending on my own recollections of the rules of pleading. I can see no reason why the plaintiff in an action should be constrained to sue any man in his official character. To me it seems most proper for the defendant to allege this in his plea if he thinks it will help his case, he best knows whether he is an officer, and whether he acts under the authority of a writ.

2nd. Because the replication to the record plea was bad. That replication, he says, should have stated what sum of money he paid in satisfaction of the execution. It does not

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But the defendant having withdrawn his demurrer to the replication & the issue join-

admit the authority under which the defendant acted nor charge that the several trespasses were committed without the reason assigned by the defendant. It will here be recollected that the appellant demurred to this replication, and when the circuit overruled his demurrer, he withdrew it.—

Had he abided by his demurrer and caused a judgment to be entered up against himself then in that case, I should have had no difficulty in saying that the replication was bad.—Reason seems to require that the appellee should state in such a plea that he had paid and satisfied the execution &c. and I believe he also should have stated how much money he had paid. He should also have stated in his replication that the said trespass in the declaration mentioned had been committed after the payment of the money due on such execution. But the appellant withdrew his demurrer, and made an issue which was found against him. Many things, good on demurrer, are cured by verdict. Without the aid of authority I am not willing to say that the circuit court committed any error in refusing to arrest the judgment for this reason. The appellants counsel has cited authority enough, but as he has not put them in my reach, it avails me nothing. The next point is the rejection of the testimony offered to be introduced by the appellant. The decision of the court, by which the appellant was refused the right of asking Cooper whether the appellee did not furnish him money to buy the property sold on execution and which was the subject matter of this suit, comes first in order. Cooper had testified for the appellee that he had a growing crop, and but one other horse and that unsound, as well as other things in aggravation of damages. It certainly then was quite reasonable to allow the other party to introduce evidence to disprove the facts the other party was striving to establish, and what witness could be less objectionable than the appellee's own witness and brother. If the appellee had money enough to purchase the horse and cow sold under the execution, then he would not have a right to claim such aggravated damages. If he had desired the witness to purchase for him, it would be still stronger evidence that he was not unwilling to have them sold, and might have raised

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in the minds of the jury a presumption that he did furnish the money. Even if the witness had denied it, it might have been material in another view to the appellant to prove that the appellee furnished the money to buy this property. His sister had testified, that, some short time after this execution issued, the appellee and his cousin had counted his money which she had seen in a trunk, she did not know the amount, but they said that the sum was sixty dollars. It will be recollected that he depended on the receipt to prove the payment of the money due on the execution. Had it been proved that the appellee furnished his brother money to buy this property, this circumstance might have induced a jury to believe that the appellee did not pay the sum of forty-one dollars to the appellant, but that he fraudulently took possession of the receipt for that sum of money, as the appellant contends he did. The questions put by the appellant, ought in my opinion to have been answered, for the two reasons above given, and the circuit court, in my opinion, committed error in disallowing them to be answered. The next question that occurs is, as to the record of the judgment &c. on which the execution issued. In the 27th section of the 3rd article of the act to regulate practice at law page 460 of the digest, an officer, like the appellant, is permitted to plead the general issue and give the special matter in evidence. The execution and the venditioni exponas were enough for him, but if he chose to offer the whole record, I can see no reason why the court should reject it even under the special plea; more especially as the appellee did not, in his replication to that plea, admit the official character of the appellant. The dates in this record might have been material, as was contended by the appellants counsel. Miss Cooper a witness of the appellee, stated that soon after the execution was issued, the appellee and his cousin had counted his money and found there were sixty dollars. By the endorsement on this execution, it appears to have come to the hands of the sheriff on the 9th of April proceeding the time of the date of the receipts, and it certainly might have been a fair subject matter of enquiry before the jury, whether a man in the circumstances of the appellee, might

ed having been found against him, the defect in the replication is cured by the verdict.

Evidence which has a tendency to disprove the facts which the other party is endeavoring to establish is admissible, particularly if such evidence can be drawn from the witness of the other party.

An execution and venditioni exponas, are a sufficient justification of a sheriff in an action of trespass against him for levying upon and selling plaintiff's property but if the sheriff wishes to offer the whole record in evidence there is no good reason why the court should refuse to permit him to do so.

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be presumed to be able to raise sixty dollars, to buy the property sold on execution, after paying the money for which that receipt purported to have been given. The evidence offered by the appellant to prove his good character was well rejected; for his character was not in issue: but in refusing to admit the record to be read, the circuit court, in my opinion, committed error. If the possession of a receipt signed by the appellant be evidence that the appellee who possessed it has paid money to the appellant, the execution, returned not satisfied, is certainly better evidence that the money due thereon has not been paid, for the officer returns the execution under the obligations of his official oath, and at the risk of an action for a false return, and it will here be recollected that the evidence of the payment of money by him is very slight; his sister saw their arms passing, as she peeped through a crack, and heard money rattle, this is all the evidence except the possession of the receipt. I conclude then that the record ought to have been read in evidence. This brings me to the enquiry whether a new trial ought to have been granted. The evidence of the payment of money by the appellee is certainly very slight, as above observed, and indeed it carries along with it a character of evil appearance. The sister of the plaintiff states that her brother came into the house, after Davis went away and read the receipt to her, it was a receipt in full, no conversation passed betwixt them, and that she did not tell him she had been looking through the crack and saw the money paid: when Davis promptly returned, on the same day, with three of his neighbors, Cooper, apparently informed of their coming, takes his gun and meets them at the fence, a short distance from the house, and angry words pass, which his sister did not understand; three of the other witnesses testify to a degree of bitterness in the language of the appellee, which could not reasonably be expected from him, had he and Davis parted in good humor, an hour or two before that time, he knows too that his sister had been looking through the crack, and saw him pay the money, although she testified that she had not then told him, but it is said he might have seen her. If he could have seen her, the

other might equally have seen her. The whole account of looking through the crack for half an hour, exposed probably to a stranger's view, to hear a conversation of good humor, and which was yet so uninteresting that the curious witness could recollect nothing but the few words above mentioned, viz: "well now we are even" and the appellants answer "well." appears to me to be too strange to be credible; other witnesses, whose testimony has been adverted to, state that the appellee had in their hearing declared that he would never pay the judgment, and that the money, should never do the plaintiff in the execution any good. This testimony, considered as a whole, appears to me to have been sufficient to induce a jury to find a verdict for the appellant; and the court ought in my opinion to have granted a new trial on that account, because then the circuit court, refused leave to the appellant to put the questions above mentioned to the witness, Cooper, and because that court did not permit the appellant, to give in evidence the execution and venditioni exponas, with so much of his return thereon as was properly made, (for I do not recollect that he had any right to return on the execution that the defendant unlawfully got possession of his receipt,) and also the record, on which that execution was issued, and also because that court did not grant a new trial to the appellant, its judgment ought in my opinion to be reversed. It being the opinion also of the other judges of this court that the judgment ought to be reversed, it is accordingly reversed, and the cause will be remanded to the circuit court.

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Davis
vs.
Cooper.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
THIRD JUDICIAL DISTRICT,

NOVEMBER TERM 1839.

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**JARRELL, DOUGHERTY & DOUGHERTY v. FARRIS Adm'r of
Cockey.**

1. Covenant by A & B against C as adm'r of D upon an agreement of D to deliver to plffs at stipulated periods, 1000 saw logs. Plea, that D in his life time delivered 200 of the logs &c. and as to the residue was prevented from delivering &c. by B one of the plffs. who on &c. assaulted and mortally wounded D, by means of which &c. D died, and so was prevented from fulfilling his covenant.— Plea demurred to and demurrer overruled. Held, that the plea was good.
2. Where the covenantee forcibly prevents the covenantor from fulfilling his covenant, the covenantee is released from its performance.
3. There is an obvious distinction between covenants for the non-payment of money, or transfer of land, or other property, and those in which the party stipulates for work and labor. The former class are not released by the death of the obligor, even though his death was occasioned by the act of the obligee, the physical capacity or incapacity of the obligee having no connection with the performance required. Otherwise where the personal services of a party are stipulated for.
4. A release from one obligee is a release as to all, and the act alleged in the plea in this case is equivalent to a release of the whole obligation.

Opinion of the Court delivered by Napton Judge.

The plaintiff in error, brought an action of covenant against the administrator of Elias B. Cockey, upon an agree-

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Jarrel, Dougherty & Dougherty.

vs

Farris, adm'r of Cockey.

ment by said Cockey to deliver a thousand saw logs at specified times in the fall of 1837 and in the winter and spring of 1838, defendant plead non est factum and a special plea that the said Cockey in his life time did deliver at the plaintiffs saw mill one hundred logs answering the description required by said agreement by the first day of October next following the date of said agreement, and one hundred by the first of November, in conformity with his covenant and that as to the residue of said logs the said Cockey was prevented from delivering the same and complying with his said agreement in that behalf by James H. Dougherty one of said plaintiffs, who on the first day of January in the year 1838, made an assault upon the said Cockey, and then and there shot him, and inflicted a mortal wound upon him, wrongfully and illegally, of which the said Cockey afterwards, to wit: on the twenty-eighth day of the same January died, and by means of which wound the said Cockey from the time of its infliction was totally unable to attend to the furnishing said logs or doing other business until he died as aforesaid and the said defendant says that the said Cockey was then by the act of the said James H. prevented and hindered from fulfilling his said covenant &c.

This plea was demurred to, and the circuit court overruled the demurrer and the decision of that court in overruling the demurrer is assigned for error in this court.

Covenant by A & B against C as adm'r of D, upon an agreement of D to deliver to pl'tfs at stipulated periods, 1000 saw logs. Plea that D in his life time, delivered 200 of the logs &c. and as to the residue was prevented from delivering &c. by B one of the pl'tfs. who on &c. assaulted

The doctrine is I believe well settled, that when the covenantee does any act of forcible prevention, the covenantor is released from the performance of his covenant, Platt on covenants 595 and authorities there cited. Indeed this court has recognized this doctrine in the case of Paulsel vs. Clendenen, 3 Mo. Rep. 230 so also, where the covenantee does any act by which the covenantor is incapacitated to observe his covenant. As if A undertakes that J S shall marry a certain woman before such a day, and the covenantee before that day marries her himself," Platt on covenants p. 595. The applicability of this doctrine to the case under consideration is questioned on the ground, first that this plea does not shew that the act of the covenantor was really an act of prevention, it not appearing, but that the killing

occurred in a quarrel having no relation to the subject matter of the covenant, second, because the covenant could have been performed as well by the representative of Cockey as by himself, and that his death in the ordinary course of nature could not have discharged his representatives; and thirdly, because it does not shew that the killing was done with any intent or with any view to prevent the performance of the covenant, and lastly because it would involve in a civil suit, a question of responsibility under the criminal law.

I apprehend there is an obvious distinction between covenants for the mere payment of money or transfer of land or other property, and those in which the party stipulates for work and labor, whilst the former class of obligation could not be released by the death of the obligor, even though that death was occasioned by the act of the obligee, the covenant being in such cases, if I may be allowed the term, a mere lien on the property of the obligor, and his physical capacity or incapacity having no connexion with the performance required. It does not by any means follow that the principle is applicable to those obligations where the personal services of a party are stipulated for. It is not a fair presumption either in law or fact, that a party who stipulates to haul saw logs, or build a house, intends to perform the labor by others and not in person, on the contrary he has a right to perform the labor in person, and in law he is considered as doing the work himself though in point of fact it may all have been performed by his servants.

If this distinction be well taken, how does the plea of defendant stand the test, was not the effect of Dougherty's act, virtually to prevent the performance of the covenant by Cockey supposing it to have been as represented in the plea. It seems to come completely within the principle laid down in the books, of an act done by the covenantee by which the covenantor is incapacitated from performing his covenant, this is not an act of prevention, but an act incapacitating the obligor from performing his covenant and if it had been the act of God, or a third person, the obligor would not

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and mortally wounded D, by means of which &c. D died, and so was prevented from fulfilling his covenant. Plea demurred to and demurrer overruled. Held, that the plea was good.

Where the covenantee forcibly prevents the covenantor from fulfilling his covenant, the covenantor is released from the performance.

There is an obvious distinction between covenants for the mere payment of money, or transfer of land or other property, and those in which the party stipulates for work and labor. The former class are not released by the death of the obligor, even though

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this case is
equivalent to
a release of the whole obligation.

have been released, but having been the act of one of the obligees it was well pleaded in bar.

The intent with which this act was done cannot be material to the merits of the plea the effect of the act is all that can be enquired into.

The cases cited by the counsel for the plaintiffs in error, it is deemed unnecessary particularly to notice, they are all cases such as I have alluded to, either where the covenant was for the payment of money or transfer of land, or where the act complained of and set up in discharge, was the act of God, or of the third party, and not the act of the obligee.

I do not perceive any particular difficulty in taking issue on this plea, because it is not alledged that the act of Dougherty was in self defence or otherwise justifiable. This would be good matter for a replication and need not be anticipated in this plea. It has also been urged that this plea, however good for Dougherty, could not be good as to the other obligees. A release from one of the obligees is a release as to all, and we hold that the act alledged in this plea was equivalent to a release.

Upon the whole, the court believe that the plea is not only sustainable in a legal point of view, but sanctioned by the principle of civil policy and sound morality. Judgment affirmed.

THOMPSON & THOMPSON V. CHILD Garnishee of CHURCH

VANDEVENTER V. Same.

POPE & WEST V. Same.

The Supreme Court will not disturb the verdict of a jury, or that of the circuit court sitting as a jury, where the evidence in the case has not been preserved in a bill of exceptions and no motion has been made in the court below for a new trial.

Opinion of the Court delivered by Napton Judge.

Defendant in error sued Calvin O. Church, in assumption and recovered judgment, Chiles was summoned as garnishee and interrogatories were filed as to his indebtedness to plaintiff.

below, an issue was made up, on the fact of indebtedness. Both parties by consent, submitted the whole matter to the court, sitting as a jury, and the court found a verdict, and afterwards gave a judgment against the garnishee, from which he appeals to this court, no motion for a new trial was made. Under the view which we take of the case it became necessary to rehearse the evidence upon which the court acting as a jury, found their verdict, the court has held, that in order to raise the point of law for the consideration of the court as to the sufficiency of the evidence to sustain the verdict, there must have been a motion for a new trial *Polk vs the State* 4 Mo. Rep. 544, *Oldham vs. Henderson*, ib. 301. Judgment affirmed with costs. The case has not been preserved in a bill of exceptions, and no motion has been made in the court below for a new trial.

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1839.

Thompson &
Thompson,
vs,
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Church.

The Supreme
Court will not
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LEE & REMINGTON V. HUNT & PADDOCK.

Same v. Same.

WOOD, et al v. HUNT & PADDOCK.

Petition in debt, brought by a mercantile firm, consisting of several partners, on a note executed to them in the name of the firm, it need not be averred in the petition that the note set out was executed to the plaintiffs by that name.

Opinion of the Court delivered by Napton Judge.

The plaintiffs Lee and Remington sued the defendants by petition in debt, on a note executed to them by their partnership name; defendants demurred to the petition, and the circuit court sustained their demurrer. There was no averment in the petition that the note sued on was executed to the plaintiffs by their partnership style.

The decision of the circuit court was on the authority of the decision of this court in the case of *Taber Shaw and Mum vs Jameson* made at the fall term 1838 in the second judicial district. The decision in that case was affirmed in the case of *Sublette and Campbell vs. Dyer and Mason*, at the last term held for the first judicial district. In both cases the court were divided. The court are now unanimous, and the petition is good under the statute, and that the

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Hunt & Pad-
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statement in the petition, that the plaintiffs are the legal owners of the note or bond, includes the averment, that the note set out, was executed to the plaintiffs by the partnership name; judgment is therefore reversed and these cases are remanded to the circuit court to be proceeded with in conformity to this opinion.

SIBLEY & MEEK V. CASEY & BIDDLE.

1. In proceedings under the act concerning "buildings," (R. C. 1835. p. 107.) to enforce a lien, the only case in which the land on which the building has been erected and a certain space around the building; can be made subject to the lien of the workman, is where the owner of the land has caused the building to be erected.
2. Therefore on a *scire facias* issued against the owner of the land to show cause why execution should not issue against the land, it is a good defence, that the land on which the building was erected, was at the time &c. the property of deft. and that deft. did not cause the building to be erected.
3. This act was not intended to exempt mechanics &c. from the operation of the established rules of law in relation to contracts. Therefore, where one of the defendants pleaded *coverture* at the time &c. such plea was held good.

Opinion of the Court delivered by Napton Judge.

The plaintiffs in error sued out a *scire facias* from the clerks office of the St. Louis circuit court, by virtue of the provisions of the 6th section of the act for securing liens to mechanics and others; Rev. Co. of '35, p. 108, calling upon Margaret Casey as the person with whom plaintiffs had contracted for a building, and Ann Biddle as the owner of the lot on which the building was erected, to show cause why judgment should not be entered up, and execution had against the property on which they had filed their lien. Defendants appeared and plead. Ann Biddle plead in substance, that the lot on which said building was erected, before and at the time of the erection thereof, was and still is the property of the said Ann, and that she did not cause the said building or any part thereof to be erected &c. and the second plea is virtually the same. Margaret Casey plead *coverture*. To these pleas, plaintiffs demurred generally.

The demurrer was overruled and judgment given for defendant.

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The only question made in this court is on the sufficiency of the pleas. The act under which this suit was instituted, provides that artizans, builders, mechanics and those who furnish materials for building under contract with the proprietor thereof shall have a lien upon such materials furnished and to work and labour done on houses and other edifices by them hereafter erected in whole or in part, each artizan, builder, mechanic and labourer, for his own work and materials furnished; the 6th section of the same act further provides "that in all cases under this act, it shall be lawfull for the plaintiff to proceed by scire facias against the original debtor and against all and every person or persons owning or possessing the property against which he wishes to proceed but no judgment to be rendered on the scire facias shall authorise the issuing of any execution except against the property charged with such lien, or such part thereof as the court shall direct. The last section says that the land upon which any building shall be erected, together with a convenient space round the same, not exceeding five hundred square feet clear of the building, shall be also subject to the liens which are to be had under and by virtue of this act, if the said land shall have been at the time of erecting the said building, the property of the person who shall have caused the same to have been erected."

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Meek,
vs.
Casey and
Biddld.

It seems from the last section, that the only case in which the land on which the building has been erected, and a certain specified space around the building, can be made subject to the lien of the mechanic, is where the proprietor has caused the building to be erected. Mrs. Biddle's plea, therefore, seems to me a complete answer to the plaintiffs demand so far as her liability as proprietor was concerned. It alleges, that she was proprietor of the land when and since the building was erected, and that she did not cause the same or any part thereof to be erected; the land was consequently clearly not liable, if this plea was true.

In proceedings under the act concerning 'buildings,' (R. C. 1835. p. 107,) to enforce a lien, the only case in which the land on which the building has been erected and a certain space around the building, can be made subject to the lien of the mechanic, is

The plea of coverture put in by Mrs. Casey is objected to on the ground that this is a proceeding "in rem" and that

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the land on which the building was erected, was at the time &c. the property of deft. and that deft. did not cause the building to be erected. This act was not intended to exempt mechanics &c. from the operation of the established rules of law in relation to contracts. Therefore, where one of the defts. pleaded *coverture*, at the time &c. such plea was held good.

no plea of personal disability can effect the merits of the claim. We cannot infer any thing from the letter and spir- it of this act of the legislature, in relation to mechanics' liens, that it was intended to exempt mechanics from the opera- tion of the established rules of law in relation to contracts. Indeed the first section of the act seems to preclude any such inference. Artizans, builders, mechanics and others who furnish materials for building, "under contract with the proprietor thereof" and those who enjoy the privileges of the lien. The word contract, I presume, was used here in its legal sense, and it is essential to the existence of a contract that there shall be parties to it capable of being contracted with. It is no more hardship on mechanics that they should keep an eye to this principle in making their contracts in relation to building houses, than it would be in reference to any other subject matter. The plea of cover- ture was therefore a good plea in bar, and the court did not err in overruling the demurrer. Judgment affirmed.

the land on which the building was erected, was at the time &c. the property of deft. and that deft. did not cause the building to be erected. This act was not intended to exempt mechanics &c. from the operation of the established rules of law in relation to contracts. Therefore, where one of the defts. pleaded *coverture*, at the time &c. such plea was held good.

LITTLE V. SEYMOUR & BOOL.

Appeal from the Circuit Court of St. Louis county.

1. A constable has no power to summon a jury to try the right of prop- erty attached. The act concerning attachments, (R. C. 1835, p. 85,) requires him to keep the property attached in his custody, unless the person in whose hands the same is found, or the owner thereof will give bond &c. that the property shall be forthcoming when &c. to abide the judgment in the cause.
2. If the constable suffers the property attached to pass out of his hands in an illegal proceeding he is clearly liable on his official bond.
3. No appeal lies from the decision of a jury summoned by a constable to determine the right of property between the claimant and de- fendant in the execution.
4. The only effect of the decision of the jury, in such case, is the jus- tification of the constable in selling the property.

Opinion of the court delivered by Tompkins Judge.

On motion of the attorney of the appellants the circuit

court made an order to Benjamin F. McKenney a justice of the peace for the county of St. Louis before whom a suit between the present plaintiffs and the defendants in this cause had been pending to shew cause why he refused to allow an appeal upon a trial of the right of property attached by the constable, on motion of the plaintiffs. The justice failing to shew cause the rule was made absolute, and afterwards, by agreement of both parties, the justice made his return. The circuit court discharged the order and the plaintiffs appealed to this court.

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Little
vs,
Seymour and
Bool.

It appears from the bill of exceptions that the plaintiffs Jesse and Freeman Little commenced a suit against the defendants Seymour and Bool by attachment. The constable levied the attachment on certain property of the defendants. Charles G. Seymour filed a plea of interpleader claiming the attached property as his own, and having withdrawn that plea the justice gave judgment for the plaintiff against James M. Seymour, one of the defendants, for the sum of fifty-nine dollars. The justice issued execution on the judgment against the attached property, the constable returned on his execution that the property attached was claimed by John Burrows and Jared Folger, and that a jury of six men had been impanelled by him, who found the property so attached to belong to said Burrows and Folger, and no other goods found. The plaintiffs Jesse and F. Little by their counsel made application to the justice to grant an appeal to the circuit court from the judgment of the said constable upon the trial of the right of property before him. The justice refused to grant the appeal. On this case, as above stated in the bill of exceptions, the proceedings above stated were had.

When goods are attached the constable must keep them in his custody unless the person in whose hands they are found or the owner thereof will give bond with good and sufficient security in double the amount of property conditioned that the same shall be forthcoming, when and where the justice shall direct to abide the judgment which shall be rendered in the causes. See sections 3, 4 and 5 of the 2nd article of the act concerning attachments p. 85 of the digest

A constable has no power to summon a jury to try the right of property attached. The act concerning attachments, (R. C. 1835, p. 85,) requires him to keep the property at-

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of 1835. The constable had clearly no right to summon a jury to try the right of property which was attached in this cause, and he is liable on his official bond for suffering the property to pass out of his hands into the possession of Burrows and Folger. The 14th section of the 7th article of the law concerning justices courts page 367, of the digest of 1835 gives to the constable when he levies an execution on property claimed by another person than the defendant, power to summon a jury to try the right of property. But the property in question was attached, and by the express language of the act above cited was required to be kept subject to the judgment of the justice rendered in the cause. The constable then is liable on his bond for his illicit act in suffering the property to pass out of his hands notwithstanding the verdict, and it remains only to be enquired, whether the justice can grant an appeal from the judgment of the constable to the circuit court. To me this is a novel question.

While at the bar I was engaged in many such trials before the sheriffs under a similar law and never heard of an appeal from such a judgment, I should rather call it the judgment of the jury. For the statute says the jury shall be the judges of the law and the fact. The only consequence of the finding of the jury is, that if they find the goods and chattels to be the property of the defendant in the execution, the verdict shall, as against the claimant justify the officer in selling such goods and chattels. The act of the constable in this case is clearly tortious and even if it had been legal no appeal lies. The proceeding is a creature of the statute; that statute gives no appeal. It would have been worse than useless to give an appeal. The practice has been (and I am not advised that its correctness was ever doubted) for the plaintiff in the execution when he thought the property belonged to the defendant to indemnify the officer, and order a sale. In such case the claimant, might sue either the constable or the plaintiff in the execution for damages, or both of them, or the purchaser of the goods.—It was contended in argument that the constable and his securities might be insolvent and in such case the plaintiff might loose his money. This would be hardship indeed. But

this court must not make an illegal decision in order to prevent an injury to the plaintiff. If the property be yet accessible to an execution, I can see no reason for an appeal from the judgment, as it is called, of the constable in order to reverse his judgment, for it is as void as a blank piece of paper, and I know of no reason why application might not be made to the justice for another, except perhaps that the law considers the property attached to be still in the hands of the constable for the purpose of satisfying the first execution. On this head see the case of Baily vs. Gentry and wife, 1st volume of Mo. Dec. page 175.

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By the 2nd section of the 2nd article of the act supplementary to an act to provide for the recovery of debts by attachment, approved 6th Feb. 1837, Burrows and Folan might have interpleaded in the cause before execution was issued. But in the mode of proceedings by attachment they had no right to require the constable to try the right of property. The judgment of the circuit court is affirmed.

COLLINS v. Adm'r of CLAMORGAN.

Error to the Circuit Court of St. Louis county.

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An estate was granted to A with a condition annexed, that she should not sell or incumber the same before attaining the age of twenty five years, B, with a full knowledge of this condition, took a conveyance of the estate from A previous to her attaining that age.— After attaining the age of twenty-five years, A conveyed the estate to C who evicted B. Held, that in an action of covenant by B against A, the consideration money paid by B to A, and interest thereon, were the true measure of damages, and not the present value of the property.

Opinion of the court delivered by Tompkins Judge.

Collins brought his action of covenant against Apoline Clamorgan; judgment was given for Collins and he here prosecutes his writ of error to reverse the judgment.

The testimony given in the cause shews that on the 8th day of November in the year 1803 at St. Louis in the then province of upper Louisiana, Joseph Brazeau by deed gran-

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Collins
78,
Adm'r of Cla-
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ted to Eutrope Clamorgan, Apoline Clamorgan and Cyprian Clamorgan a certain lot of ground in the said village of St. Louis upon the burthen and condition of not being able to use the said lot or selling it, incumbering or pledging it, before the youngest of them should have arrived at the age of twenty-five years when by consent they might all dispose of it, and in case one or more of them should die before the age of twenty-five the survivor or survivors should inherit to such deceased. On the 21st day of September 1827, Apoline Clamorgan conveyed by deed the said lot to Charles Collins the plaintiff in this action, both Eutrope and Cyprian Clamorgan being then dead, on the 29th day of July 1828, she conveyed the same premises to Alexander Fryer.

The consideration paid by Collins was three hundred dollars. Apoline made the sale to Collins before she had attained the age of twenty-five, Fryer brought his action against one Dougal the alienee of Collins for the possession of the premises, and evicted him, and the present action was brought by Collins against the administrator of Apoline Clamorgan to recover damages. In the case of Dougal vs. Fryer decided by this court [see 3 vol. Mo. Decision p. 43] it is decided that she could not convey the premises before she had arrived at the age limited by the deed, altho' by the American law introduced since the execution of Brazeau's deed the age of majority was fixed at twenty-one years. The question now to be decided by this court is, what shall be the measure of the damages which the plaintiff may recover in this action. The plaintiff in the circuit court prayed that the jury be instructed that the measure of his damages was the present value of the property, and not the purchase money with interest. This instruction was refused, and the jury were instructed that the consideration paid by Collins to Apoline and interest on it was the true measure of damages. This instruction is assigned for error and is the sole point to be decided. Collins' counsel, to sustain his point relies on the case of McConnell's heirs vs. Dunlap's devisees Hardens' Rep. page 41, McConnell in his life time had sold to Dunlap five hundred acres of land, he had title to no more than one ha f of it, and of this

McConnell could not have been ignorant as the warrant to locate the land had been furnished by one Patrick to whom one half of the land belonged, in consideration of his having furnished the warrant, Dunlap was not informed by McConnell of the fact. It is not pretended that Collins was ignorant of the provisions of the deed by which Brazeau conveyed to Apoline, we are not to presume, that he would have taken a deed without seeing her title papers. He was not informed by her of the law of the case; every person must be supposed to make his contract with a knowledge of the law governing the case. Collins, then having seen the deed made by Brazeau to convey this land to Apoline, must in law be supposed to be informed of the legal import of its provisions, and Apoline can be charged with no fraudulent concealment from him, and therefore not liable to any other penalty than the re-payment of the consideration money and interest with costs of suit. The circuit court, then for the reasons above given seems to have committed no error in this decision. Its judgment is therefore affirmed and the plaintiff in error will pay the costs of prosecuting this appeal.

conveyed the estate to C, who evicted B. Held, that in an action of covenant by B against A, the consideration money paid by B to A, and interest thereon, were the measure of damages, and not the present value of the property.

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morgan.

An estate was granted to A with a condition annexed, that she should not sell or incumber the same before attaining the age of 25 years, B with a full knowledge of this condition, took a conveyance of the estate from A previous to her attaining that age. After attaining the age of 25 years, A conveyed the estate to C, who evicted B. Held, that in an action of covenant by B against A, the consideration money paid by B to A, and interest thereon, were the measure of damages, and not the present value of the property.

MUSICK AND WIFE V. RICHARDSON.

Error to the Circuit Court of St. Louis county.

A died possessed of certain lands, which, by order of the circuit court, were directed to be sold, and the proceeds distributed among the representatives of deceased. By agreement among the representatives, deft. who had married one of the daughters of deceased, became the purchaser of the land, and was to sell the same for the benefit of all the representatives, Deft. in pursuance of this agreement sold the land to one J. Held, that under this state of facts, an action of assumpsit for money had and received could be maintained against deft. in favor of plaintiffs, representatives in part of deceased, for their distributive share of the proceeds.

Opinion of the Court delivered by Tompkins Judge.

Musick and wife brought their action of assumpsit in the

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wife.
vs.
Richardson.

circuit court against Richardson, where judgment being given against them they appealed to this court.

The facts of the case preserved in the bill of exceptions and material to be considered are these:

William Jamison of St. Louis died possessed of certain lands which by order of the circuit court of St. Louis county were directed to be sold and the proceeds of the sale to be distributed among the representatives of the deceased.— By agreement among the representatives of the deceased. Richardson, who had married one of the daughters of the deceased, became the purchaser of the land, which, by said agreement, was to be sold by him at a convenient time for the benefit of all the representatives of the deceased, Musick had married Phæbe one of those representatives, no consideration was proved other than that necessarily and naturally arising from the contract.

Richardson afterwards conveyed this land to William G. Pettis in order to secure a debt due to George Collier, and afterwards sold the same land to John M. Jamison, one of the representatives, subject to the encumbrance above mentioned. The purchaser agreeing to pay to the other representatives of William Jamison their respective portions of the purchase money. In pursuance of this agreement *betwixt* Richardson and John M. Jamison, said Jamison executed to Musick a note for the portion of the purchase money which was due to Musick in right of his wife, and this contract betwixt Richardson and Jamison being afterwards rescinded, Musick delivered up to Jamison the note which Jamison had as above mentioned made and delivered to him, and it was cancelled.

Some time after Richardson again sold the land to Jamison on the same conditions. Soon after this second purchase, Jamison informed Musick, plaintiff in the circuit court and appellant here, of the purchase and the terms and withal promised to pay him the part of the purchase money due in right of his wife. Musick did not then make any objection but soon afterwards informed Jamison he would not take him for the money but would look to Richardson and no other person, for his wife's portion. It was proved that

John M. Jamison after the second purchase made by him had paid all the representatives their portions except Musick. On this evidence the court instructed the jury that there was no evidence of any money had and received by the defendant to the use of the plaintiff, upon which this action can be sustained. The instruction was excepted to and a new trial prayed because of the instruction given.

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wife
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It is clear that Richardson had sold the land and if he did not receive money he ought to have received it, for it does not appear that he sold on a credit; had he sold on a credit the representatives must certainly have waited till he could collect. But it appears that money was collected, and that five out of six of the representatives had received their share. Musick and wife were certainly entitled to their distributive share of the part collected, even if a credit had been given for the rest. But this is not pretended. It remains then only to enquire whether Richardson can extricate himself from the responsibility he had incurred by undertaking to sell this land for the benefit of himself and the other representatives of the deceased by sending John M. Jamison his vendor to tell Musick of the second sale of the land by Richardson to himself, and to promise to pay Musick and wife their share of the purchase money. To state the case, is of itself, a sufficient answer to the enquiry.—

When a man makes himself liable to pay money he must either pay it, or give something else which the payee accepts in satisfaction, or he must be released from his liability by writing under seal; it is not in evidence that Musick even assented to take the promise of Jamison as satisfaction of Richardson's liability. The circuit court then in my opinion committed error in giving that instruction to the jury and should therefore have granted a new trial. Its judgment is therefore reversed and the cause remanded.

married one of the daughters of deceased, became the purchaser of the land, and was to sell the same for the benefit of all the representatives. Defendant, in pursuance of this agreement sold the land to one J. Held that under this state of facts an action of assumpsit for money had and received could be maintained against deft. in favor of plaintiffs, representatives, in part, of deceased, for their distributive share of the proceeds.

A died possessed of certain lands, which, by order of the circuit court, were directed to be sold, & the proceeds distributed among the representatives of deceased. By agreement among the representatives deft. who had

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Sweeney

vs.

Willing.

SWENFI vs. WILLING.

Appeal from the Circuit Court of St. Louis county.

1. Where a demurrer was filed to the declaration, but no judgment entered on the demurrer and issue afterwards joined on a plea to the action, the Supreme court will presume that defendant withdrew his demurrer.
2. Where a bill of exchange, drawn by plaintiff on defendant, the consideration of which was goods sold and delivered &c. was protested for non payment, the amount due may be recovered in an action of assumpsit for goods sold &c.

Opinion of the court delivered by Thompkins Judge.

The appellees plaintiffs in the circuit court, sued Willing in assumpsit, the declaration contained three counts.

The first special and the two others general. In the first they state, that they made their bill of exchange directed to the defendant, and thereby requested him to pay to one Alexander Rogers or order the sum of seven hundred and eighty eighty dollars and sixty nine cents; that the defendant accepted the bill but failed to pay, and it was returned to the plaintiffs. The second count is for goods, Wines &c. sold and delivered to the defendant to the same amount viz: \$788 69. The third is the same amount of money due on an account stated. Judgment was given in the circuit court for the plaintiffs, and to reverse that judgment the defendant appealed to this court.

The bill of exceptions shows that Thomas Young a witness in the cause proved that he was in the service of the plaintiffs, and as their agent sold to the defendant certain articles, in the witnesses deposition mentioned, and furnished the defendant with a bill of the same, that the plaintiffs drew the bill in the first count mentioned on the defendant for the amount of the goods sold him as before stated, the bill was endorsed by Rogers and sent on to St. Louis for collection through the Northwestern Bank of Virginia and was returned protested to the Northwestern Bank, and was paid by the plaintiffs; he further states that the endorsement made by Rogers, was for the accomodation of the plaintiffs and that he had no interest in the bill, and that plaintiffs at the time were bonafide holders of the bill. Rogers testified also that he never had any interest, and that he merely endorsed &c. for the accommodation of the plaintiffs.

A witness produced on the part of the defendant appellant here state that he was paying teller in the agency of the commercial Bank of Cincinnati established at St. Louis. That the bill of exchange had been put into the possession of the said agency for the purpose of collection, that the defendant called at the agency on the day the bill became due just before the doors were closed with a bundle of bank bills in his hand and observed to the witness that he came to take up the bill, not wishing it to be dishonored; that he took the bank bills and counted them over, separating such as were received in bank from such as were not, and put both parcels on the counter and that he made the figures 530 on the back of the bill of exchange shown him by the defendant's counsel, this was the amount of the money which was bankable, that he received none of it, it not being the custom in that agency to receive less than the whole amount in such cases, and that he does not know what became of either parcels of the said bank bills. It was in evidence that the notary public on the authority of the defendant alone stated in the protest that five hundred and thirty dollars of the money due on the bill had been paid. The appellant assigned for error that the court overruled a demurer which he had filed to the declaration. No judgment was entered up for the plaintiff on the demurer, if one had been entered there would have been an end of the cause in the circuit court, and the cause would have come into this court on issue of law. But the defendant prayed leave to plead and pleaded a general issue and a verdict being found against him, and judgment entered up thereon, he must be supposed to have withdrawn his demurer, and it only remains for this court to enquire whether there was any one count in the declaration on which a finding for the plaintiff could be had. The first count according to the rule in 2d Phillips p. 31 and 32, would have been good if the plaintiff had averred that the bill had been returned to them and that they as drawers were obliged to pay. I am inclined to believe it would have been equally as well to have averred (which was proved) that the bill belonged to them.

The plaintiff, from the evidence given might in my opin-

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Where a demurer was filed to the declaration but no judgment entered on the demurrer, and issue afterwards joined on a plea to the action; the sup. court will presume that defendant withdrew his demurer.

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Sweeney,
vs
Willing.

Where a
bill of ex-
change
drawn by
plaintiff on
defendant the
consideration
of which was
goods sold
and delivered
&c. was pro-
tested for non
payment, the
amount due
may be recov-
ered in an ac-
tion of as-
sumpsit for
goods sold &c.

ion, well recover on either the second count for goods &c. sold and delivered or on the third for account stated.

It was also assigned for error that the circuit court refused a new trial.

The circuit court instructed the jury that if they should be of opinion that the sum of five hundred and thirty dollars was actually received by the paying teller and not returned to the defendant, they should credit the defendant by this sum, but if they should be of opinion that it was not so received, or if received, was returned to the defendant, they ought not to credit the amount thereof to the defendant. The jury undoubtedly had evidence enough before them to justify them in finding for the plaintiff. The instruction given by the court was as full and favorable for the defendant as could be reasonably asked.

The defendant also objected to Rogers as a witness rendered in competent by interest. The testimony of witness Young in the first instance, and of Rogers in the second, shows plainly that he Rogers had no interest in the subject matter of litigation.

For the reason above given the judgment of the circuit court is affirmed.

NOTE.—The points and citation of authorities by council, were not sent by the clerk to the reporter with the decisions of this term.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

FOURTH JUDICIAL DISTRICT,

SEPTEMBER TERM 1839.

DICKEY and others v. MALECHI.

1. The 10th sect. of the act concerning wills and testaments of Feb'y 19th 1835, (see R. C. 1825, p. 792,) giving to the circuit court jurisdiction of the probate of wills in certain cases, is not inconsistent with the 6th section of the act concerning courts of 7th Jan'y 1825, (R. C. 1825, p. 270) providing, that the several courts of probate shall have exclusive original jurisdiction in all cases in relation to the probate of last wills and testaments, &c." and the 4th sect. of the act of Jan'y 2nd 1827 by which the probate court was abolished, and all its jurisdiction transferred to the county court
2. The circuit court, in entertaining a petition to establish a will, which has been rejected by the county court, does not exercise any original jurisdiction. The legislature may provide other modes, besides the ordinary form of appeal, by which the controlling power of the circuit court may be exercised, and in the 10th sect. of the act concerning wills and testaments, (R. C. 1825, p. 792,) they have made such provision.
3. Whether a will is destroyed before or after the death of the testator, if destroyed without his knowledge or consent, it does not cease to be his will, and its contents may be established by competent proof.
4. One witness is sufficient to establish the contents of a lost will.
5. Probate may be granted of so much of a will as can be proved.
6. The rule, that when a demurrer is over ruled and not withdrawn it remains on the record a confession of the facts set forth in the pleading demurred to, does not apply where the court does not give judgment on the demurrer but suffers the parties to go before a jury on issues made up under the direction of the court, such as

M

6	177
46a	251
6	177
131	547
6	177
67a	538
6	177
115b	519
156	530
6	177
179	397

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quent action of the court amounts to an implied withdrawel of the demurrer.

7. The 10th sect. of the act of 1825, concerning wills and testaments, providing that the verdict of the jury shall be final as to the facts, precludes the Supreme Court from enquiry into the sufficiency of the evidence to sustain the verdict of the jury, in proceedings under that section; but as in other cases, if the court permit illegal testimony to go to the jury, the Sup. Court has power to correct such error.
8. The introduction of incompetent testimony, is as much an error of law as the giving of wrong instructions, and it is a matter which the Sup. Court will look into.
9. A devisee, who is also heir at law, is a competent witness to establish the contents of a will lost or destroyed, when he has no interest in the event, or when the establishment of the will is against the interest he would have as heir.

Opinion of the court delivered by Napton Judge.*

One Antoine Simmino of St. Genevive County, about the 5th of January 1833, made his last will and executed it according to law, in the presence of two witnesses John Findly and John Blital Beauvais, and died about four or five days after making his said will. John Campbell and Ebenezer Dickey, who had married sisters of Simmino, were appointed Executors by the will. Immediately after the execution of the will by Simmino, who was proved to have been of disposing mind at the time, he handed the will to Campbell and requested him to place it in his (Simmino's) pocket book, and put the pocket book in his (Simmino's) desk, which was in the room where he lay. Campbell did as he was directed: but on the morning after the death of Simmino; Campbell and Dickey, the executors named in the will, went to Simmino's house to take possession of the will, but could not find it; nor has it ever been produced since. There was proof conducing to show that the will was in existence, on the evening before the testator died, and also on the morning after, in the course of which it disappeared. It also appears from the testimony, that the provision of the will was in accordance with the previously fixed intentions of the testator frequently expressed to various individuals.

*Judge McGirk absent during the present term of this Court.

In January 1833, Ebenezer Dickey took out letters of administration upon the estate of Simmino, and proceeded to act under the same. About the first of March 1834, Francis Malechi, to whom a considerable real and personal property had been left by the will, by his Guardian Ichabod Sargent presented his petition to the County Court of St. Genevieve County, praying that the paper writing annexed to his petition, purporting to be the substance of the will of Simmino, might be admitted to probate, and calling on the heirs at law to shew cause &c. and requiring them to answer on oath touching the premises. The cause came on to a hearing in the County Court, and that Court adjudged that there was no such last will and testament of Simmino as Malechi in his petition had alleged.

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In June 1836, the defendant in error, Francis Malechi, by his guardian, filed his petition in the Circuit Court, praying to have the will established, reciting the rejection of the same by the County Court, and citing the heirs at law to appear. The heirs at law, plaintiffs in error, appeared and plead first to the jurisdiction of the Court, alledging substantially, that the matters in the petition had been fully adjudicated in the County Court, and that, that Court had exclusive jurisdiction. To this the petitioner demurred, and the Court sustained the demurrer. The heirs at law then demurred to the petition, which demurrer was overruled: and afterwards they put in a plea in bar grounded on the former adjudication by the County court; to which plea, plaintiff in error demurred, and the demurrer was sustained. The case was then submitted to the jury, upon an issue made up by the parties under the direction of the court; and a verdict was found for the petitioner: a new trial was granted at the instance of the defendants in error, and another issue made up, and upon that issue the jury found for the petitioner the will as annexed to his petition. A motion was made by the heirs at law for another new trial, and in arrest of judgment, both of which were refused, and the heirs at law have appealed to this court. There were four bills of exceptions taken on the trial of the issues in the circuit court containing the entire testimony; which seems to have consisted altogether of depositions. These depositions

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were taken by consent of parties, waving any exceptions to their formality, as to time, place, notice &c.; but the plaintiffs in error, reserving to themselves, the privilege of objecting to the testimony on the trial for incompetency or irrelevancy.

The provisions of the will were established by the testimony of Joseph D. Grafton, who drew it up; neither of the subscribing witnesses being privy to its contents. The deposition of Ebenezer Dickey and John Campbel, the two executors named in the will, and who had married sisters of the deceased; were also read in evidence, together with so much of the affidavit of Ebenezer Dickey, as related to his belief in the existence of a will, and that after the most diligent search, it could not be found. Objections were taken to the reading of the depositions on the ground of incompetency and irrelevancy; and to the deposition of Ebenezer Dickey, because he was a party to the cause. After closing the testimony, the defendants asked the court for the following instructions to the jury.

"1. That if they do not believe that the said supposed will existed at, and after the death of the said Antoine Simmino, no, they must find for the defendants.

"2. That if they believe that the supposed will was lost, or destroyed, before the death of the said Antoine Simmino, by his consent, connivance or direction, they must find for the defendants.

"3. That unless they believe the said paper purporting to be the last will and testament of Antoine Simmino, was signed by said Antoine Simmino, with a full knowledge of all its provisions, or by some person for him by his directions, they must find for the defendants.

"4. That if the said supposed will was lost, or destroyed, two witnesses who read the will prove its existence at and after the death of the testator, remember its contents and depose to its tenor, are necessary to establish the same.

"5. That in the event of the loss or destruction of said will, it will require the testimony of two witnesses to establish the contents thereof, and that one witness is not sufficient.

"6. That the whole provisions of the will must be established, and not a part only, and if the jury are satisfied that the facts proved establish a part only of the provisions of the will, they must find for the defendants.

The court gave the second and third instructions asked, and refused to give the first, fourth, fifth and sixth instructions, and in lieu thereof instructed the jury, that one witness was sufficient to establish the contents of a will, after the execution of the will has been proven by two subscribing witnesses, and also that they might find such parts of the will as were proved without finding any thing in regard to the residue, and also that it was not necessary to prove that the will existed at, or after the death of the testator.

Defendants excepted to the giving of the several instructions given, and the refusal to give those asked for, and after the verdict of the jury for the petitioner, moved for a new trial which was refused, and afterwards in arrest of judgment, which was also overruled.

The appellants have made various points, on which they rely for a reversal of this judgment, but it is believed that though couched in different terms, and presented under a variety of aspects, they are substantially as follows.

1. That the circuit court had no jurisdiction over the subject matter presented in the petition of Francis Malechi; but that the jurisdiction was exclusively in the county court.

2. That the circuit court erred in giving improper instructions, and in refusing those asked for by defendants.

3 That the court admitted improper and incompetent testimony on the trial.

First. The petition of Malechi was founded on the 10th section of the act respecting wills, (rev. co'25 p. 792,) this section provides that, "where any will is exhibited to be proved, (in the county court) the court or clerk may immediately receive the proof and grant a certificate of probate; or if such will be rejected, a certificate of rejection. If any persons interested shall, within five years thereafter appear, and by his petition to the circuit court of the proper county, contest the validity of the will proved; or pray to have a will proved that has been rejected, an issue shall be made

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The 10th section of the act concerning wills and testaments of Feb. 19th 1825, (R. C. 1825, p. 792,) giving to the circuit court jurisdiction of the probate of wills in certain cases, is not inconsistent with the 6th sect of

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the act con-
cerning
courts of 7th
Jan'y 1825,
[R. C. 1825, p
270] provid-
ing that the
several courts
of probate,
shall have ex-
clusive origi-
nal jurisdic-
tion in all ca-
ses relative to
the probate
of last wills &
testaments
&c. and the
4th sec. of the
act. of Jan. 2d
1837, by
which the
probate court
was abolished
and all its ju-
risdiction
transferred to
the county
court.

The circuit
court in en-
tertaining a
petition to es-
tablish a will
which has
been rejected
by the county
court, does
not exercise
any original
jurisdiction.

The legisla-
ture may pro-
vide other
modes, be-
sides the ordi-
nary form of
appeal, by
which the
controlling
power of the
circuit court
may be exer-
cised, and in

up whether the writing produced be the will of the testator or not, which shall be tried by the court, or by a jury, if either party require it.

The objection urged to the exercise of jurisdiction in this case, rests on the provision of the act of 1825, by which, the courts of probate were invested with exclusive original jurisdiction in all cases, relative to the probate of last wills and testaments, the granting letters testamentary, and repealing the same &c. and upon the act of 2nd Jan'y 1827, by which, the probate court was abolished and all its jurisdiction transferred to the county court.

I do not see that the circuit court in entertaining the petition of Malechi, did exercise any original jurisdiction. The respective provisions of the two acts above recited are entirely consistent with each other. The legislature may undoubtedly provide other modes besides the ordinary form of appeal, by which the controlling power of the circuit court may be exercised, and in the 10th section of the act respecting wills and testaments, they have made such a provision. The recital in the petition of the rejection of the supposed will by the county court, with the annexation of the record of the judgment of the county court proving that fact was sufficient to give jurisdiction to the circuit court. The judgment of the county court; in which they found that no such will as the paper writing presented to them existed, was a virtual certificate of rejection, sufficient to authorise the petitioner to proceed under the 30th section, and demand a review of that judgment in the circuit court. The circuit court did not therefore err in overruling the demurrer to the petition, and in sustaining the demurrers to the pleas of the defendants.

Second. The first instruction asked for by defendants, and refused by the court, was, that if the jury do not believe that the said supposed will existed at, and after the death of the said Antoine Simmino, they must find for the defendants. This instruction was very properly refused by the court, whether the will was destroyed before, or after the death of the testator: if it was destroyed without his knowledge, or consent, it did not cease to be his will, and its contents could

be established by competent proof. The cases cited at the bar in support of the principle laid down in this instruction have not been produced, but I apprehend that the courts have never gone farther than to declare that proof of the non existence of a will before the death of the testator might be presumptive evidence of its revocation and throw the burthen of proof on the party setting up the will, it required satisfactory proof of its loss or destruction. But the principle laid down in the instructions asked, would open the door to knavery and fraud, and place it in the power of the dishonest to frustrate that disposition which every man has a right to make of his own property. Here the court gave the second instruction asked, which embraced the true law, and which was much more applicable to the evidence, than the first could have been, admitting it to have been abstractly true. The testimony of Dickey, who was named in the will as one of the executors, was that he saw the will about sun set, of the evening preceeding the morning when Simmino died; that he was with Simmino from the time he last saw the will until Simmino died; and during that time, Simmino expressed no dissatisfaction with the will, indeed, said nothing relating to it, and that Simmino could not have destroyed the will without his knowledge. The evidence of Findley, one of the subscribing witnesses was that Campbell, one of the executors named in the will, in a conversation had with witness on the morning of the funeral of the deceased, informed witness, that the will was in existence: that Simmino had made no alteration in the will, but that it remained the same as it was drawn by Mr. Grafton, and witnessed by him, Findley. Dickey also testified that on the day after the funeral, when he and Campbell went to get the will, for the purpose of proceeding under it, they were unable to find it and Campbell observed to him, "he wished he (Dickey) had come sooner, it would have saved trouble, as the will could not have been gone above half an hour"; Findley also testified that he heard of Basil Simmino, a brother of the deceased, say, with an oath, that his sister, the wife of John Campbell, would give him the will, and he would destroy it; giving as a reason for its destruction, that the will was "ungrateful"

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the 10th sect.
of the act
concerning
wills and tes-
taments. (R
C. 1825, p. 7-
92,) they
have made
such provi-
sion.

Whether a
will is des-
troyed be-
fore or after
the death of
the testator,
if destroyed
without his
knowledge or
consent, it
does not
cease to be
his will, and
its contents
may be estab-
lished by
competent
proof.

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towards the family of Antoine Simmino; as it gave the greater part of his property to a half negro.

Upon this state of evidence, the instruction given was surely strong enough for the defendants, "that if they believe that the supposed will was lost or destroyed before the death of Antoine Simmino by his consent, connivance or direction, they must find for defendants."

One witness
is sufficient
to establish
the contents
of a lost will.

The fourth and fifth instructions are in substance, that two witnesses are necessary to establish the contents of a lost will. This point was expressly adjudicated upon a review of the authorities by this court in the case of Graham and others vs. O'Fallon ex'r of Mullanphy, 4 Mo. Rep. 601. There was no error in refusing these instructions.

Probate may
be granted of
so much of a
will as can be
proved.

The next instruction, the refusal of which is complained of, was that the whole provisions of the will must be established and not a part only and if the jury are satisfied that the facts proved establish a part only of the provisions of the will, they must find for the defendants. This point has also been settled by this court in the case of Jackson vs. Jackson and others 4 Mo. Rep. 211, in which the court held that so much of the will as can be proved may be admitted to probate.

Third. The only point remaining for consideration is relative to the admission of improper testimony. It is urged by counsel for defendant in error, that inasmuch as the defendant below demurred to the petition, and the demurrer was overruled and never withdrawn, the demurrer remains on the record a confession of the facts of the petition, and this court is precluded from inquiring into the testimony either as to its sufficiency or legal admissibility. This was the strict rule of law in England and may be so here, but

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I apprehend that where the court does not give judgment on the demurrer, but proceeds to suffer the parties to go before a jury on the issues made up under the direction of the court it amounts to an implied withdrawal of the demurrer and it is too late now for the defendant in error to rely on the technical advantage of which he might possibly have availed himself in the circuit court. It would be allowing him to take advantage of his own laches for had he moved

for a judgment on the demurrer in the court below; the opposite party would no doubt have asked and obtained leave to withdraw their demurrer, such being I believe the uniform practice in this state, restricted only by the power of the court to impose terms on the party asking for a leave to withdraw.

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It is also urged, that as there were two verdicts in this case for the petitioner, and consequently one new trial granted, the law in relation to the granting of a second new trial, by which the court is restricted to cases where the jury have misbehaved or have erred in matters of law, is applicable to the reviewing powers of this court. The statute under which this application was made is also referred to. That statute provides "that the verdict of the jury, or the judgment of the court, shall be final as to the facts, saving to the court the right of granting a new trial as in other cases, and to either party an appeal in matters of law to the Supreme Court, as in other cases". By this I understand that this court cannot enquire into the sufficiency of the evidence to sustain the verdict of the jury, but that, as in other cases, if the court have allowed illegal testimony to go to the jury, this court has power to correct such error. The introduction of incompetent testimony is as much an error of law as the giving of wrong instructions and it is a matter which the court will look into. The act in relation to new trials has no application, except to the objection urged in this court that the circuit court overruled this second application for a new trial. In support of which objection the plaintiff in error should have made out the existence of one of the two state of facts pointed out in the law to justify the granting of a second new trial.— Nothing appears on the record to show either that there was any misbehavior of the jury, or any error of law committed by them. The jury are clearly not responsible for the correctness of the law as given by the court, but a failure to obey its instructions, or a misunderstanding of their meaning as evidenced by the facts found in their verdict, must be the error of law contemplated in this section of the statute, *Hill vs Wilkins* 4 Mo. Rep. 86.

to, does not apply where the court does not give judgment on the demurrer but suffers the parties to go before a jury on issues made up under the direction of the court, such subsequent action of the court amounts to an implied withdrawal of the demurrer.

The 10th sect. of the act of 1835, concerning wills and testaments, providing that the verdict of the jury shall be final as to facts, precludes the Sup. Court from enquiring into the sufficiency of the evidence to sustain the verdict of the jury, in proceedings under that sect; but, as in other cases, if the court permit illegal testimony to go to the jury, the Sup. Court has power to correct such error.

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The introduction of incompetent testimony, is as much an error of law as the giving of wrong instructions, & it is a matter which the Sup. Court will look into.

Believing then that this court is not precluded from examining the legality of the testimony offered on the trial I proceed to notice the portions of the written testimony objected to. The reading of all the depositions was objected to by the defendants below upon the general charge of incompetency and irrelevancy. This court has often determined that such general and sweeping objections are insufficient. The party must point out the objections more specifically to authorize this court to interfere. I, however, see nothing illegal or irrelevant in the testimony to which these general objections were taken. But the defendants specified more particularly their objections to the admission of Dickey's deposition; to the reading of this deposition, it appears from the bill of exceptions, defendants objected 'as being both irrelevant and incompetent, the said Dickey being one of the defendants in the cause.' The decisions of this court would, I believe, sustain me in saying that it does not appear from this record that Dickey was in fact a defendant and that the defendants assertion that he was, in the motion to exclude the deposition, was no proof of this fact and the court might have overruled the motion on the ground that the facts stated in the motion were not true. In Davidson vs. Peck (4 Mo. Rep. 438) it was held that where the circuit court overruled a motion to exclude certain depositions on account of alleged informalities in their execution, and the fact of such informalities existing is not preserved by bill of exceptions, this court cannot know but that the circuit court overruled the motion because the facts stated in the motion did not exist or were falsely stated. In Cozzens vs. Gillespie (4 Mo. Rep. 82.) the defendant offered to read the deposition of one Walter D. Scott, and objections were made to the same on the ground that Scott was interested, and to show the interest, it was proved that 'defendant and one Walter D. Scott had once been partners,' it was held that the identity of witness with the person who had once been the partner of the defendant was not proved, and could not be inferred from the identity of names, and the deposition was therefore admissible. These cases seem to establish the insufficiency of the objections here taken to Dickey's testimony.

ny, but I am unwilling to rest an opinion on the technical difficulty sustained by these cases, conceiving that the facts stated in the motion in the one case and in the bill of exceptions in the other, raised a violent presumption of their truth, especially as they were uncontroverted in the circuit court.

This deposition was admissible, as I think, upon other grounds. The proceeding had in this case, though the heirs at law are made nominal parties, was in truth in the nature of an *ex parte* proceeding. It was a revival of the same proceeding in the circuit court which had been previously had in the county court. There can be no question that in the county court the deposition or answer of Dickey, or any other heir, could have been read unless objected to on other grounds than the mere fact that he had been cited as one of the heirs at law, and consequently stood on the record as one of the defendants. In truth, the citation, is for them to appear and show cause &c. why the paper shall not be established. The same legal rules that govern the investigation in the county court must apply in the circuit court. The deposition of Dickey was nothing more nor less than his answer on oath to certain interrogatories propounded by the petitioner. Whether he could be compelled to answer or not is no question raised by this record. No *subpœna ad testificandum* was issued. The deposition seems to have been voluntarily made, and whether admissible as evidence on the trial or not, must depend, not on the question whether he was a defendant, but whether there was no other objection to him on account of a personal disability or an interest in the event. The interest of Dickey was clearly against the party calling him—he was one of the heirs at law and from the contents of the will as proved by Mr. Grafton, his share of the estate as heir, would have greatly exceeded the trifling legacy which had been left him in the will. The principle decided in *Graham vs. O'Fallon ex'r of Mullanphy*, is there applicable. On the ground of interest there could be no objection to Dickey even had he been a party *de facto*. It may be questioned whether he could not have voluntarily waived the privi-

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A devisee,
who is also
heir at law
is a competent witness
to establish
the contents
of a will lost
or destroyed,
when he has
no interest in
the event, or
when the establishment

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of the will is
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lege which that position gave him and his deposition be read. His admission could have been proved and why not his voluntary admission under oath. But whether a party in interest, Dickeys testimony, whether in the shape of a deposition, in answer to interrogatories, or as an answer to the citation following the petition, was good evidence either in the county or circuit court, unless some other objection to it existed besides what is founded on the fact of his being a party.

Any other construction of the law would lead to intolerable consequences. A party seeking to establish a lost will is bound to cite the heirs at law. The relations of a testator are most likely to be the persons most conversant with his intentions and around and about his person and house during his last illness. If the testimony of all these persons must be excluded on the ground of their being parties, and they are necessarily made parties in such proceedings, it must become exceedingly difficult in most cases, and in many cases absolutely impracticable, to establish most of the facts necessary to authorise the probate of a lost will. It places it in the power of the persons most likely to be interested in suppressing the will to shut out all investigation and shield themselves under a rule of law from all responsibility. Such a state of things could never have been contemplated either by our statute law regulating proceedings to establish wills, or sanctioned by the common law rules of evidence. Judgment affirmed.

Cole for Appellee.

1st. The circuit court had jurisdiction of the case.

2nd. The defendants as to the facts of the case are concluded by their demurrer on the record.

3rd. That the question "Testamentum vel non," is a question of fact not to be enquired into by the appellate court.

4th. The circuit court has committed no error in matter of law that will justify a reversal of the judgment.

Scott and Zeigler for Appellants.

1. That no legal will was ever presented to the county court or clerk thereof to be probated, proved, or established, according to law.

2. There was no legal rejection of the said supposed will by the county court on which to found the application to have the same established in the circuit court on petition.

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3. That the circuit court had no jurisdiction over the subject matter presented to them in the petition of said Malechi to have the will established, but that the jurisdiction was exclusively in the county court.

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4. There was no evidence that the said supposed will existed at and up to the time of the death of the testator, or that any search or enquiry had been made for the original.

5. That the petition to the circuit court to establish the supposed will did not state that the will existed at the time of the death of the testator, and had not been destroyed or cancelled by himself, and that diligent search had been made therefor.

6. That the said petition to the circuit court did not state the whole provisions of the said supposed will, but the substance of particular provisions and in part only.

7. That there was not sufficient or competent proof of the contents of the said will for they must all be fully proved.

8. That the circuit court admitted improper and incompetent testimony on the trial of the cause in the circuit court.

9. That the circuit court erred in overruling the demurrer filed by the defendants below to the petition and exhibits of the petitioner.

10. That the circuit court erred in sustaining the demurrer of the said Malechi, the petitioner, to the plea in bar of former recovery and adjudication filed by the defendants in the court below.

11. That the circuit court erred in setting aside the non suit for the reason that no sufficient grounds were shewn to justify the court for so doing.

12. That the circuit court ought to have arrested the judgment on the reasons filed in that behalf.

13. That the circuit court in the giving of some and refusing to give others of the instructions asked to be given or

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Any other construction of the law would lead to intolerable consequences. A party seeking to establish a lost will is bound to cite the heirs at law. The relations of a testator are most likely to be the persons most conversant with his intentions and around and about his person and house during his last illness. If the testimony of all these persons must be excluded on the ground of their being parties, and they are necessarily made parties in such proceedings, it must become exceedingly difficult in most cases, and in many cases absolutely impracticable, to establish most of the facts necessary to authorise the probate of a lost will. It places it in the power of the persons most likely to be interested in suppressing the will to shut out all investigation and shield themselves under a rule of law from all responsibility. Such a state of things could never have been contemplated either by our statute law regulating proceedings to establish wills, or sanctioned by the common law rules of evidence. Judgment affirmed.

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4th. The circuit court has committed no error in matter of law that will justify a reversal of the judgment.

Scott and Zeigler for Appellants.

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3. That the circuit court had no jurisdiction over the subject matter presented to them in the petition of said Malechi to have the will established, but that the jurisdiction was exclusively in the county court.

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4. There was no evidence that the said supposed will existed at and up to the time of the death of the testator, or that any search or enquiry had been made for the original.

5. That the petition to the circuit court to establish the supposed will did not state that the will existed at the time of the death of the testator, and had not been destroyed or cancelled by himself, and that diligent search had been made therefor.

6. That the said petition to the circuit court did not state the whole provisions of the said supposed will, but the substance of particular provisions and in part only.

7. That there was not sufficient or competent proof of the contents of the said will for they must all be fully proved.

8. That the circuit court admitted improper and incompetent testimony on the trial of the cause in the circuit court.

9. That the circuit court erred in overruling the demurrer filed by the defendants below to the petition and exhibits of the petitioner.

10. That the circuit court erred in sustaining the demurrer of the said Malechi, the petitioner, to the plea in bar of former recovery and adjudication filed by the defendants in the court below.

11. That the circuit court erred in setting aside the non suit for the reason that no sufficient grounds were shewn to justify the court for so doing.

12. That the circuit court ought to have arrested the judgment on the reasons filed in that behalf.

13. That the circuit court in the giving of some and refusing to give others of the instructions asked to be given or

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rejected to the jury on the trial. See bill of exceptions Nos. 2 and 3.

14 That it is entirely too uncertain from the testimony what the several provisions of the will were, even supposing such a will to have once existed.

15. That unless the whole provisions of the will are proved the court cannot give it the proper construction, or carry into effect the intention of the testator according to the statute.

16. That two witnesses are equally necessary to prove the contents of a last written will as in the case of a non-cupative will.

CHURCH VS. BRIDGMAN & WIFE.

1. Action of slander—plea, that the slanderous words were spoken on the authority and information of one S. and that at the time of speaking the words, defendant gave the name of the author. Held to be a good plea of justification.
2. But to sustain this plea, the defendant is bound to prove that the words were actually spoken by the person whose name was given up as the author.
3. Where the slander imputed was in relation to the crime of passing counterfeit money, there must be a colloquium in the declaration averring that deft. spoke the words of and concerning pltf's commission of the offence of passing counterfeit money, knowing the same to be counterfeit.
4. The want of this averment in the declaration is not aided by the innuendo.

Opinion of the Court delivered by Napton Judge.

Church sued Bridgman and wife in the circuit court of St. Genevieve county for slanderous words spoken of him by the wife of Bridgman. The slanderous words charged in the declaration were that defendant said "that he (meaning Church,) was packing up to go away and that he was a good deal behind hand, and that he was in the habit of handling and passing counterfeit money, (meaning that he the said Church knew the same to be counterfeit,) that he had passed a counterfeit ten dollar note on one Simms, (meaning what is usually called a ten dollar bank note, and meaning that the said Church knew the same to be counterfeit,) pur

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that he got his counterfeit money from the same place where he bought his goods, (meaning that the said Church knew the same to be counterfeit,) and came down here, (meaning the county of St. Genevieve,) and passed it off when and as he could and that he, (meaning the said Church) had taken counterfeit money and goods back in the county and purchased horses, (meaning that he the said Church had bought horses and paid for them in counterfeit money and which he the said Church knew to be counterfeit,) and that all this was no secret it being all over town, (meaning the town of St. Genevieve, in the county of St. Genevieve,) &c." Defendants pleaded the general issue and a special plea in justification. The special plea alleged that before the speaking of the words charged, the defendant had been told by one Simms that the said plaintiff was a good deal behind and that he intended to go away, that the plaintiff was in the habit of passing bad money and that he (Church) had changed a twenty dollar bill for him, (Simms) and that Church gave him a ten dollar counterfeit bill, and that it was the general report in town that he got the counterfeit and bad money from the same place where he got his goods, and came down here to pass it off, that it was no secret but generally known throughout the town, and that at the time of speaking the words charged, she the said defendant, declared in the presence and hearing of all to whom she spoke the words she had heard, and been told the same by the said Simms. Issue was taken upon this plea, and upon the plea of not guilty; the parties went to trial, and the jury returned a general verdict not guilty: a motion was made for a new trial because the verdict was without evidence, and not sustained by the evidence, and against law, which was overruled, and the plaintiff appealed to this court. The bill of exceptions shows the substance of the evidence to have been as follows: one Adams testified on behalf of plaintiff, that he called at Mr. Bridgman's house, and Mr. Bridgman enquired of him how Church came on, if he was not going away; that Mr. Simms had told him on the day before, that he heard he was packing up to go away, that he was a good deal behind hand, and he (Simms) told her, that he heard he was

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in the habit of handling and passing bad money; that he had changed a twenty dollar note for him Simms; and Church gave him a ten dollar counterfeit note on the United States Bank, and that it was the general opinion, or report in town, that he got this counterfeit or bad money, from the same place where he got his goods, and that down here he passed it off where, and as he could, and that it was also thought he took some goods, and some such counterfeit money out back in the county, and bought horses with it to bring here and sell; she said that it was told to her as no secret, Mr. Simms had told her, and told her as no secret, for it was all through town. The witness also proved that Church was a merchant.

James Simms testified, that he had a conversation with Mrs. Bridgman about November 1837, and that in that conversation he stated to her that Church had changed a twenty dollar bank note for him, and had given him in exchange a ten dollar note on the Bank of the United States, which note he had passed to C. C. Valle, who after having had the same examined had returned the same to witness, stating that it was believed that the note was counterfeit. Witness took back the note and returned the same to Church who took it and gave him good money. Witness stated that he made no other statement to Mrs. B. in relation to Church, or his conduct, or about this matter in dispute and that even the above was stated to get rid of the conversation in relation to Church. W. Scott also testified that Mrs. Bridgman, one of the defendants, had brought him a note to collect on Church about this time, and that she complained much of his neglect in failing to pay, but nothing was said in relation to Church's character, or his passing counterfeit money, this was all the testimony in the case.

The errors relied on by the appellant are, that the circuit court erred in permitting the defendants to prove that Casa Bridgman had heard the words spoken by an other, and only repeated them.

2. In refusing to grant a new trial.

The evidence objected to by appellant it seems was elicited from his own witness Adams. The plaintiff did not de-

mur to the plea, but if the plea was bad the evidence was admissible under the general issue, 2 Saunders on Evidence 353. There has been much diversity of opinion both in England and this country, in relation to the sufficiency of such a plea as was here put in. The weight of authority is however in support of the plea, in an action for verbal slander. In *Burris vs. McCorkle* (2 Brown's Rep. 90, cited in *Starkie Ev. p. 471*.) the rule as to oral slander is stated to be, that if the words are uttered generally, the defendants cannot justify by giving the name of the author in his plea, or at the trial, it can then only go in mitigation of damages, but if at the time he repeats the words, he gives the name of the author so that the party may have his action against him, it is a justification. The case of *Anthony vs. Stevens* (1 Mo. Rep. 254) does not at all militate with this doctrine. This court in that case held, that it was no justification, nor even a mitigation of damages, for defendant to prove on the trial that others had spoken the slanderous words. That is certainly a very different matter from the case where a party states the slander as on the information and authority of another, and at the time of making the statement gives the name of his author, *Earl of Northampton's case* 12 Rep. 130. *Davis vs. Lewis* 7 T. Rep. 17 cited in 2 Sand. on Ev. p. 377. I suppose the true criterion to be the *quo animo* with which the words are uttered, and though accompanied with the name of the author they may be repeated with a malicious intent and a mischievous effect; of this the jury must be the judges. The plea was good and the evidence was clearly admissible under the plea.

The second error alledged is the refusal of the court to grant a new trial because the verdict was against evidence.

The testimony of Adams sustained the plea so far as it went, but the testimony of Simms was a positive contradiction of the statement of Cassa Bridgman. To have sustained this plea the defendants were bound to prove the slander actually published by the person whose name was given up as the author. *Maitland vs. Gouldney*, 2 East. 426. This they entirely failed to do and defendants not having withdrawn their plea of justification and the plaintiff having pro-

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Action of
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Church
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Bridgman and
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Where the
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ved the slanderous words, there seems to be nothing in the evidence on which the verdict could be supported, even if the jury disregarded the testimony of Simms, to whom the original slander was imputed, for the burthen of proof devolved on defendant under his special plea; but the declaration in this case is fatally defective. The slander imputed was in relation to passing counterfeit money, which is no offence under our law, unless it is done knowing the same to be counterfeit. There is no colloquium in the declaration averring that defendant spoke the words of and concerning the plaintiff, and of and concerning his commission of the offence of passing counterfeit money, knowing the same to be counterfeit. The want of this averment in the colloquium is not helped by the innuendo, *Morris vs. Dyer* 4 Mo. Rep. 214. Had the plaintiff got judgment in the circuit court it ought to have been arrested—but as the judgment below is for the defendant that judgment must be affirmed. Judgment affirmed.

plaintiff's commission of the offence of passing counterfeit money, knowing the same to be counterfeit.

The want of this averment in the declaration is not aided by the innuendo.

Scott and Zeigler for Appellant.

1st. The error of the circuit court is in permitting the defendants to prove by a witness, that the defendant Cassa Bridgman heard the words spoken by another and that she only repeated them. On this point, see the case of *Anthony vs. Stephens* 1 vol. Mo. Rep. page 254.

2nd. Point relied on is the error of the circuit court in refusing to grant a new trial for the reasons filed. See the testimony in the case, also see the decision in the case of *Estes vs. Antrobus* 1st vol. Mo. Rep's. page 197 and the statute on the subject of new trials page 470, 3 vol. Mo. R. page 188 *Cooper vs. Barlow*.

Brickey for Appellees.

1. That this cause was fairly submitted to a jury upon the issues joined, and the evidence of the plaintiff alone, (the deft's offering no evidence,) and the jury being exclusively judges of all facts and circumstances of the case and having found a verdict for the defts, there is no error in the court refusing a new trial.

2. The evidence in this case shows that if the words spoken were slanderous, they were spoken by the wife of the defendant in his absence, without his knowledge, consequently the damage, if any, must have been inconsiderable, and it is a general rule where the damages must necessarily be trifling, the court will not grant a new trial.

3. The words charged and alleged to be slanderous in the declaration are not in themselves actionable and there being no special damages, laid or proved the plaintiff can not recover. 1 Chit. Pl. 486-7-8. 1 Chit. pl. 381-2-3. 2 Chit. pl. 506-7, as to form of the plea. 3 vol. Mo. Rep. 188, (Cooper vs Marlow). 2 Esp. N. P. 88.

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FRASIER VS. THE STATE.

Indictment under the 7th sect of the act concerning grocers, (R. C, 18-35, p. 292,) first count charged that the def., exercising the trade and business of a grocer, did then and there sell spiritous liquors to divers slaves &c., second count, that defendant had been and was regularly licensed to exercise the trade and business of a grocer &c. Held that under the indictment, it was necessary for the state to prove that defendant was a grocer, or acted as grocer, and the time of selling, as the offence of selling liquor to a slave without permit from his master by an unlicensed grocer, or a person who does not keep a grocery, is a different offence from the one charged in the indictment and the punishment is different.

Opinion of the Court delivered by Napton Judge.

The appellant was indicted in St. Genevieve county, for selling spiritous liquors to a slave without the permit in writing from his master; under the 7th section of the act concerning grocers. The indictment after laying the venue, charged that defendant "exercising the trade and business of a grocer, did then and there, sell spiritous liquors to divers slaves, to the jurors aforesaid unknown, without a permit in writing from the owner or possessor of such slaves, for that purposes first had and obtained according to law to the evil example &c."

The second count charged that defendant had been, and was regularly licensed to exercise the trade and business of a grocer, and then and there bring licensed to trade, and exercise the business of a grocer; as aforesaid did then and there sell spiritous liquors to a slave, the property of and

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belonging to one widow Larose, at the county aforesaid without any permit in writing from the said widow Larose, the owner and possessor of the said slave, first had and obtained, to warrant and authorise the said Frasier to sell spiritous liquors to the said slave.

There was a verdict against the defendant and judgment for fifteen dollars. It was proved on the trial that defendant sold to a slave, the property of Mrs. Larose, some whiskey, for which he received pay from said slave, and there was no other evidence.

A motion was made for a new trial because the verdict was against the evidence, which was overruled, and a motion in arrest, which was also overruled.

Indictment under the 7th sec. of the act concerning grocers, (R. C. 1835; p. 292.) First count charges that def. "exercising the trade and business of a grocer, did then and there, sell spiritous liquors to divers slaves &c. second count, that def. had been and was regularly licensed to exercise the trade and business of a grocer &c. Held that under this indictment, it was necessary for the state to prove that def. was a grocer, or acted as a grocer, at the time of selling, as the offence of selling liquor to a slave without

Both counts in this indictment charge the defendant as a grocer, and one count charges him as a licensed grocer: there was no proof that he acted as a licensed grocer at all; the offence of selling liquor to a slave, without a permit from his master, by an unlicensed grocer, or a person who does not keep a grocer, is a different offence from the one charged in this indictment, and the punishment is different. The verdict of the jury for fifteen dollars, and the judgment in pursuance thereof, prove plainly that the offence charged and punished, was for selling as a grocer; there is clearly a variance between the proof and the indictment, one of the essential ingredients of the offence was not proved.

The act in force at the time of finding this indictment, declared what constituted a grocer, one who *deals in the selling* of wines &c., and one who "deals in the selling of goods &c."

No inference could be drawn, from a single act of selling a single pint of whiskey, that the vender was a grocer. If the offence was equally prohibited in grocers and all others, the averment in the indictment, that defendant was a grocer, might perhaps be regarded as surplusage, and the verdict be well sustained. But this is not the case, there is one penalty imposed on grocers, who are licensed, and another, and higher punishment, inflicted on unlicensed grocers, and persons not exercising the trade or business of a grocer. Supposing the description in the first count, that

defendant was a grocer, to be rejected as surplus age, the verdict of the jury for fifteen dollars' could not be applicable to that count, because the minimum penalty inflicted by the statute, on such venders of liquors, is twenty dollars.

The second count was not sustained by the evidence, for there was no proof that he had a license, because that was a matter of defence, more proper to be set up by himself, and which he might easily establish in mitigation of the offence; but it was easy to prove that he "dealt in the selling" of liquor &c., and this was not done. The judgment of the circuit court is reversed.

Cole for Appellant.

1. The circuit court erred, in overruling the motion in arrest of judgment, for the following reasons. The indictment counts upon two distinct offences, with different punishments, the judgment and finding of the jury are general, this is a misjoinder and therefore erroneous.

2. The circuit court erred in overruling the motion for a new trial, because the evidence does not maintain the indictment. In order to convict on either count of this indictment it was necessary for the state to prove the material facts, the constituents of the offence as alleged; this has not been done; there was no proof that defendant was a licensed grocer, this was a material fact, and wholly omitted on the part of the state.

Brickey for the State.

1. Is there a misjoinder of counts in the indictment?
2. Was the state bound to prove that the defendant was a regular licensed grocer, having charged him so in the indictment?

PHELPS VS. HAWKINS.

Error to the Washington Circuit Court.

A scire facias cannot issue to revive a judgment confessed before the clerk of the circuit court in February 1820. The clerk, at that period, having no power to take confessions of judgment.

Opinion of the court delivered by Tompkins Judge.

Austin H. Hawkins sued Phelps in the circuit court in an

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permit from
his master by
an unlicensed
grocer, or a
person who
does not keep
a grocery, is
a different offence from the
one charged
in the indictment, and the
punishment
is different.

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action of trover for some horses. To bring the whole matter up before the court Phelps pleaded specially that Daniel Phelps deceased, in his life time, on the ninth day of February in the year 1820, by the acknowledgement and confession of John Hawkins before the clerk of the circuit court of Washington, did recover against the said John Hawkins the sum of three hundred and forty-three dollars and seventy-one cents for his debt &c., afterwards, to wit: on the 22nd day of February in the year 1838, Timothy Phelps administrator of the said Daniel Phelps sued out of the office of the clerk of the circuit court of the said county a writ of scire facias to revive said judgment in the name of said Timothy, and that the same was revived and execution issued thereon in favor of the defendant Timothy Phelps administrator of Daniel Phelps, and that by virtue of this execution the property sued for was executed and sold to the defendant. The plea admits that the property in these horses was acquired by Augustus Hawkins, an infant son of John Hawkins, the father of the plaintiff, while living under his direction and by him sold to the plaintiff in this action. To this plea a demurrer was filed by the plaintiff, and in the issue of law a judgment was rendered for the plaintiff in the action and damages assessed.

A scire facias cannot issue to revive a judgment confessed before the clerk of the circuit court in Feb'y 1820. The clerk at that period, having no power to take confessions of judgment.

To reverse the judgment of the circuit court the writ of error was sued out, and the case brought here.

This judgment, on which the execution issued, was confessed on the 20th Feb'y 1820 and revived by scire facias in 1838 in the name of the present plaintiff in error, who was defendant in the circuit court. In the case of Holmes and Elliott vs. Carr & co. 1st vol. Mo. Dec. pages 56 and 57, this court decided that the confession before the clerk did not amount to a judgment. The court say, that it is competent for the clerk to take the cognovit actionem upon which the circuit court may at the next or any subsequent term enter up a judgment as of the next succeeding term. But until the cognovit or confession be ripened into a complete judgment, an execution issued thereon might well be quashed. The plaintiff in error, however, contends that the revival of the judgments by scire facias is equivalent to a

motion to enter up judgment on notice given to the person who had confessed in conformity with the above cited opinion of this court, not adverting to this circumstance that a scire facias supposes a pre-existing judgment which is intended to be revived, whereas the notice required by the decision of this court to be given when judgment is not entered up at the term next succeeding the confession is preparatory only to ripening that confession into a judgment of the circuit court.

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The defendant in that sci. fa. might well contend that the writ of sci. fa. to revive a judgment could not be a notice to shew cause why a judgment should not be entered up on a confession made before the clerk. Such being the opinion of the court, and that opinion too resting on a decision of this court as old almost as the court itself. It is deemed useless to pursue the enquiry as to the merits of the plea any further, indeed it would seem almost extrajudicial to enquire any further into its merits after the claim of the plaintiff in the execution, appellant in this cause, is as it were extinguished. The case of Holmes and Elliott vs. Carr & Co. although the only one in our books that contains a decision on that statute has been the rule of decisions, in the several circuit courts of this state, in more than one hundred cases. In the latter part of the year 1820, the year when this confession was taken, the Legislature passed another act allowing confessions of judgment to be taken by the clerks of the circuit courts in vacation. Judgments confessed under the last act have been decided to be valid. For the reasons above given the judgment of the circuit court is affirmed.

Frissell for Plaintiff in Error.

1st. That all the property acquired by an infant by his own labor while living with, and under the care, custody, and control of his father belongs to his father. 2 Kent's Com. 193. Reev's domestic relation 290. Gale vs. Panote 1 N. H. Rep. 28. Bigelow's Digest 553. Benson vs. Renington 2 Mass. Rep. 113. Nightingale vs. Withington 14 Mass. Rep. 272. 1 Black. Com. 453.

2nd. That property so acquired and held by an infant is subject to the law relative to voluntary conveyances. If

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the father sells it or it be sold by the sheriff to satisfy the debts of the father, the purchaser acquires a good title. 2 Kent's Com. 440, 444.

3rd. That John Hawkins, the father, being insolvent any gift of property to his son while insolvent is fraudulent and void as against creditors. 2 Kent Com. 440-4.

4th. That the sale of property by Augustus Hawkins was of no more validity than a sale by his father would have been; in this matter he must be considered his fathers agent and acting by his directions.

5th. That the executions in the officers hands were a lien upon the property, and this sale must be considered as a fraud upon the plaintiff in execution. Stat. of Mo. 256, sec. 15. Do. do. 259, sec. 43. Acts of 1838-9, 43, sec. 3.

Scott and Zeigler for Appellee.

1. That the demurrer was properly sustained, because the plea was double, recitative, argumentative and presented no bar to the plaintiffs action. 3 Black. Com. 308. 1 Chi. pl. 513. 5 Bac. abr. 322. Do. do. 418. Do. do. 443-5. 1 Chi. Pl. 18. 1 do. do. 19. 1 do. do. 523.

2. That it is competent for an infant under 21 years of age to acquire property by his own labor, and hold the same independent of his father or his father's debts. 1 Bla. Com. 453. 2 Kent's Com. 193-4. Bingham on infancy 27 note. 15 Mass. Rep. 272.

3. That it is competent for an infant under 21 years of age to acquire property by the result of his own labor while he lives or resides with his father and to hold the same independent of his father's debts. 1 Blac. Com. 453. 2 Kent's Com. 193-4. Bingham on infancy 27 note 15 Mass. Rep. 272. 4 Mass Rep. 675. Bingham on infancy 6 note 4.

4. That it is competent for an infant under 21 years who resides with his father, with the consent of his father, to acquire property by the result of his own labor and hold the same independent of his father or his debts. Bingham on infancy 27 note. 1 Blac. Com. 453. 15 Mass. Rep. 272. 2 Kent's Com. 193-4.

5. That it is lawful for a father to give permission to his son

under age to work for himself and to retain and keep the proceeds of his labor. 1 Blac. Com. 453. 3 Peck Rep. 201. 2 Kent's Com. 193-4-5 note a. 7 Conn. Rep. 92. 12 Mass. Rep. 375. 6 Conn. Rep. 547.

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6. That it is lawful for a father to give permission to his son under age to work for himself, and it is further lawful for such father to employ such son, and compensate him for such, his labor. 1 Blac. Com. 443. 7 Conn. Rep. 92. 2 Kent's Com. 193-4-5 a. 6 Conn. Rep. 547. 12 Mass. Rep. 395. 1 Vermont Rep. 41. 3 Peck Rep. 201. 4 Berry Rep. 487.

7. That it is lawful for a father to make a gift of property to his son under age, and while living with him. 2 Kent's Com. 441, note a. Do. do. 441, note e. Do. do. 441-2, note a, and authorities there cited.

8. That a contract with an infant is binding on the adult and that no person can set it aside or impeach the contract but the infant himself, being a personal privilege to the infant to avoid or affirm such contract. Bingham on infancy 13 in note. Do. do. 1 note 1. 5 John's Rep. 160. 13 Mass. Rep. 250. 14 do do 461. Bingham on infancy 49, 50. 1 Mad. Rep. 25. 2 Strong Rep. 937, 1101. 3 Brew. Rep. 1794. 2 Tenn. Rep. 161. 2 Sand. pl. and evi. 580-1.

THOMAS VS. VAN DOREN, PEASE & PEERS,

1. An objection to a plea *puis darrien continuance* that it was not pleaded in proper time, cannot be taken advantage of by the plaintiff, on demurrer; but it should be made on motion to set aside the plea.
2. It rests, however, in the discretion of the court, to receive such a plea or not, after more than one continuance between the time the matter of the plea arose, and the putting in of the plea.
3. A plea must state facts, and not the belief of the party of the existence of those facts.

Opinion of the Court delivered by Tompkins Judge.

Thomas commenced his action by petition in debt against the defendants in the circuit court. The writ was returned to the March term for the year 1838. At this term pleas were filed and the cause was continued from term to term till the term of July 1839, when one of the defendants was

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An objection to a plea *pursu-
ant to a continuance*
that it was
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the plaintiff,
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but it should
be made on
motion to set
aside the plea.

It rests,
however, in
the discretion
of the court,

allowed to file another plea, he having made oath that the subject matter of the defence intended to be set up did not come to his knowledge till since the last term of the said court. The plea contained substantially this statement, that on the 8th day of March 1838, at the City of Washington, the defendant gave to Thomas, as collateral security for the payment of the note sued on, as well as of another note of the defendant made to the plaintiff Thomas of the same amount, certain notes made by several individuals payable to Van Doren, Pease & Co. to the amount of two thousand six hundred and twelve dollars and sixty-three cents, all of which notes the said Thomas had either collected or otherwise disposed of, and had failed to give the defendant any credit for. In the plea it was further stated, that at the same time he gave to the plaintiff Thomas, one hundred and thirty-eight shares of the capital stock of the sugar loaf coal company of the par value of fifty dollars per share amounting to, and worth six thousand nine hundred dollars. This stock was also delivered as collateral security for the notes above mentioned, which stock the defendant avers that he does believe the said Thomas has sold, or otherwise disposed of at its par value, and for this also he avers that he has had no credit allowed. To this plea a demurrer was filed by Thomas. The court overruled the demurrer, and Thomas by the writ of error brings the cause here, to reverse the judgment of the circuit court. For the plaintiff it is contended that the plea is filed too late. In the case of *Smith vs. Dyer*, 10th Johnson, 162. The court say that the proper course for the plaintiff if he wish to avail himself of the objection that the plea was not pleaded in season, is by motion to set it aside and not by demurrer, on demurrer this court are to judge from the plea itself, whether it is good in form or substance, and not whether it was put in in the regular time for pleading such plea. It rests in the discretion of the court to receive it or not, even after more than one continuance between the time that the matter of the plea arose, and the coming in of the plea, and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea. But this plea is bad in itself. In

the first part of the plea it is well averred that all the notes amounting to two thousand six hundred and twelve dollars and sixty-three cents, the said Thomas has collected, &c.

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But in the second part he avers that he does believe that the said Thomas has sold or otherwise disposed of the said stock at its par value &c. Certainly his belief cannot be issuable matter; it being quite immaterial to the merits of the case what he may believe, and quite impossible for Thomas to prove that he does not believe. For this defect in the plea, the demurrer ought to have been sustained. The discretion of the circuit court does not appear to have been improperly exercised in admitting the plea at the time it was filed, and even had there been a motion to strike it out it is not apparent to me that such motion ought to have prevailed. But because of the defect in the plea above mentioned the judgment of the circuit court is reversed, and the cause will be remanded for further proceedings in conformity to this opinion.

to receive
such a plea or
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more than
one continu-
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the time the
matter of the
plea arose, &
the putting in
of the plea.
A plea must
state facts, &
not the belief
of the party
of the exist-
ence of those
facts.

Scott and Zeigler for Appellant.

1. That the doctrine of amendment does not apply to, or mean the introduction of a new substantive defence. But only to new mould or put into proper form the defence first relied on, and the plea here filed was a new substantive defence. Rev. Code 458 sec 8. Do. do. 467, sec. 1-2. 5 Cowen 37. 18 John Rep. 310. 17 do 3. 2 Wendell 259. 1 Wendell 126.

2. That the plea in this case if, intended as a plea in bar and if allowable at the proper time, came here too late after the cause was called for trial. Rev. Co. 458, s. 6. Do. do. 467, sec. 1-2.

3. That the plea itself upon its face shews that the defence contained, if any, was known to the party at the time of filing his original pleas to the merits of the action at the return term of the writ. The writ is dated 15th day of July 1838, returnable to the 3rd Monday March term 1838. The defence set up in the plea is dated the 8th day of March 1838.

4. Consequently that this matter could not be filed as a plea of puis darrien continuance for the record and plea shews that several terms had elapsed and several continuances

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ces intervened before this plea was offered or filed. 1 Chit. Pl. 531-2. 1 do. do. 636. 1 do. do. 697. 1 do. do. 634-5. 1 do. do. 696-7. Bul. N. P. 310. 4 East. Rep. 502. 2 Sanders Pl. & Evi. 723.

5. That no plea of puis darrein continuance can come in after the lapse of one or more terms after the matter of defence arose. 3 Bla. Com. 316. 1 Som. Rep. 198. Selwin N. P. 118. L. Raymond 693. 2 Wel. Rep. 137-8-9. 5 Bac. Abr. 477-8-9. 2 Sak. Rep. 519. Bullers N. P. 309. 1 Chit. Pl. 637. 1 do. 698.

6. But if such plea could come in after the lapse of a term, upon terms imposed by the court, still this plea is defective in form and substance and presents no complete bar to the plaintiff's action. 1 Chitty Pl. 637-8. 1 do. 698-9. Buller N. P. 309-10. 2 Wel. Rept. 137-8-9. Selwin N. P. 118. La Ray'd 693. 5 Bac. abr. 477-8-9-80, forms of pleas. 2 Chitty 676-8. 3 do. 1238-9-40. 2 Harris ent. 14-89. 3 Blac. Com. 316. 9 John Rep. 221. 1 vol. Mo. Rep. 416-17.

7. But suppose the plea intended not as a plea of puis darrien continuance, but as an amended plea in bar to the action still it is defective because it states that the notes and stock &c., were given as a collateral security and not given and received in satisfaction and payment of the claim, nor is there any averment that the notes and stock in the plea named produced the satisfaction or resulted in the payment of the debt in the note in this suit mentioned. 9 John Repts. 221. 5 Peters Repts. 232. 1 Sanders Pl. & Evi. 110. 3 East's. Rept's. 99-251.

Frissell for Defendant in Error.

1. The plea in this case was not put in too late.
2. The case of Morgan and Smith vs. Dyer, 10 John Rep. 161, is a case in point.

In this case the declaration was filed May term 1811, imparlance to August term of same year, when defendant plead nul tiel record, and continuances were entered until Oct. term 1812, and in vacation following the defendant plead puis darrein continuance to wit, on the 24th of September 1811 he had been discharged under the insolvent debtors act.

3. If a plea is put in at an improper time the proper course is to move to strike out, not to demur. 10th John 161.

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PAGE VS. THE STATE.

1. An indictment for vending clocks without license, must allege a sale or some other disposition of a clock in the way of trade: but it is not necessary to allege to whom the clock was sold, or the price that was given.
- 2 The 12th sect. of the act concerning peddlers (R. C. 1835, p. 429,) requires a license to peddle clocks, whether manufactured in the state or not.

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Opinion of the Court delivered by Napton Judge.

The grand jury of Crawford county found a bill of indictment, at the November term of 1838, against Charles Page, for vending clocks without license. The first count in the indictment, charged that defendant "did deal and trade in the selling of clocks, by going from place to place to sell the same at the county aforesaid, without a special license therefor according to law, and contrary to the statute &c.

The second count charged that defendant, "did deal in the selling of clocks, not being the growth, produce, or the manufacture of the State of Missouri," &c. as before.

The third and fourth counts are substantially the same as the second.

The jury found the defendant guilty, and the defendant moved for a new trial, and in arrest, both of which motions were overruled by the court.

There are two question raised on the record in this count. First, whether selling clocks manufactured in this state without a license, was an offence under the act as it stood in 1838. And second whether the indictment was substantially good.

The indictment charges that defendant "dealt and traded in the selling of clocks," and "dealt in the selling of clocks as a clock pedlar," and went about from place to place to sell clocks. This is very well as far as it goes, and was a sufficient description of the occupation of the defendant, to bring him within the province of the statute. But no offence is laid in the indictment; no act of sale is charged. It is not sufficient that

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defendant was a clock pedlar, and that he traveled through the country in that capacity, to subject him to the penalty of the law: he must be charged and proved to have done some act in that capacity to render him liable. A merchant may expose his wares in a public store house, may possess all the articles necessary to constitute him a merchant; yet I apprehend that until he proceeds to sell or dispose of in some way some article in his line of business, he is not liable to an indictment for selling merchandise without license.

The case cited by the circuit attorney, of *The state vs. Ames*, (1 Mo. Rep. 524,) has no application to this case.—The court held in that case that in an indictment for gaming it was not necessary to alledge with whom the bet was made or what sum was bet, so in this case it is clear that the state need not alledge to whom the clock was sold or bartered or the price that was given, but it does not follow from this principle, or any other principle of the criminal law, that the indictment must not alledge a sale or some other disposition of a clock in the way of trade. The indictment is fairly defective in this particular.

An indictment for vending clocks, without license, must allege a sale or some other disposition of a clock in the way of trade, but it is not necessary to allege to whom the clock was sold, or the price that was given.

The 12th sec. of the act concerning pedlars (R. C. 1835, p. 492,) requires a license to peddle clocks, whether manufactured in the state or not.

The disposition of this point renders any opinion on the other point not absolutely necessary in this case, but as the party may be indicted again, it may be well to state that neither Judge Tompkins nor myself entertain any doubt that the law of '34 requires a license to peddle clocks, whether manufactured in the state or not. The 12th section of the act to license and tax pedlars declares that "no person shall peddle clocks without a special license for that purpose."—This is sufficiently distinct and definitive to require no aid in construing it. The first section provides "that those who deal in the selling of goods, wares, and merchandise, not the growth, produce, or manufacture of this state by going from place to place to sell the same" are pedlars. The exception here obviously applies to the article sold or peddled and by no fair rule of construction could this exception be extended to the 12th section in which there is no exception. It is here that we must resort to the first section to ascertain what kind of selling constitutes a pedlar, but the articles to be

sold or peddled, cannot be transferred to the 12th section for the purpose of carrying with them a proviso which is not to be found in that section. Judgment affirmed.

Colo for Appellant.

1st. The indictment is insufficient, and no lawful judgment can be given upon it. The circuit court erred in refusing to arrest judgment. 1st. Chitty pl. 187. King vs. T. Mason. 1 D. east 268. Supra 582. Hamuel vs. State. 5 Mo. Rep. 260.

2d. To vend clocks manufactured in the state, was not a violation of the law. L. M. 428, sec 1, L. 1838, page 92.

3d. The circuit court erred in refusing a new trial.

4th. Upon the fact of the case, the defendant should have been acquitted. State vs. M. Byrd 1 M. R. 485.

Brickey for the State.

In the investigation of this case I shall present two questions for the consideration of this court.

1. "Was the pedling and selling clocks without a license (admitting the clocks were manufactured in this state,) an indictable offence.

2. "Is the indictment so defective in form and substance, that the court could not render judgment after the finding of the verdict of the jury.

In order to sustain the indictment, and to shew that pedling and selling clocks without a license whether the said clocks were manufactured in this state or not, I rely upon the following authorities. Digest page 429, Sec. 1-12 -13 -14, 1 vol. Mo. Rep. page 524 State vs. B. Ames. Archbolds Crim pl. page 45-54.

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LAPORTE VS. THE STATE.

1. Where, in a change of venue in a criminal case, the venue sent up is imperfect, the court will not, for that reason, discharge the deft from his recognizance, especially as the change of venue in such cases is on the application of the deft.
2. The usual and regular mode of proceeding in such cases, is for the circuit attorney to suggest a diminution of the record, and move for a writ of certiorari, directed to the circuit court of the county from which the change of venue was taken, to send up the record.
3. A writ of error will not lie on the decision of the circuit court in overruling a motion to discharge a deft. from his recognizance, such not being a final decision in the cause.

Opinion of the court delivered by Tompkins Judge.

Laporte was indicted in the circuit court of St. Genevieve county, and on his motion a change of venue was awarded to the county of St. Francois. The clerk of the circuit court of St. Genevieve county sent to the circuit court of St. Francois county nothing of the record but the caption and recognizance, and the order for a change of venue, purporting to be made on motion of the defendant.

Where, in a change of venue in a criminal case, the record sent up is imperfect, the court will not, for that reason, discharge the deft. from his recognizance, especially as the change of venue in such cases is on the application of the deft.

In the circuit court of St. Francois county, Laporte the defendant moved that the cause be stricken from the docket and that he be discharged from his recognizance for reasons filed, the sum of which is that the record showed no charge against him. The circuit court overruled the motion, and on motion of the circuit attorney ordered the papers in the cause to be remanded to the circuit court of St. Genevieve county to be perfected by the clerk of said court, and certified according to law to the next term of the circuit court of St. Francois county. To this decision of the court exception was taken, and the matter was assigned for error.

The usual and regular mode of proceeding in such cases, is for the circuit attorney to suggest a diminution of the record, & move for a writ of certiorari, directed to the circuit court of

The more usual and regular way of doing such business, is for the circuit attorney to move for a writ of certiorari directed to the circuit court of St. Genevieve county, to send up the record, which the circuit court of St. Francois county, on the suggestion of a diminution of the record then before the court, by the circuit attorney would have ordered to be issued. The mode adopted by that court seems to be equally efficient, and it does not appear that the defendant is likely to be in a worse situation for that. The delay is not unreasonable or uncommon. It was his own act to

change the venue, and on such occasions it is not uncommon for an imperfect record to be sent up. The decision of the circuit court in this behalf was correct, and the cause will be remanded to be proceeded in. Moreover this was no final decision and consequently the writ of error does not lie.

In the case of Adam R. and James Johnson against the State on an indictment for a malicious prosecution for like reasons the same order is made.

Scott and Zeigler for Appellant.

Authorities cited: Revised Code of 1835, page 487, sect. 19, and page 488 sections 26, 27, 28.

Brickey for the State.

1. Can this court legally consider the case at all as now presented here there never having been any final judgment or conclusive disposition of the case in the court below?

2. Did the circuit court err in overruling the several motions of the defendant?

3. Did the court err in sustaining the motion of the State to remand the papers to the clerk of St. Genevieve, and requiring him to perfect and transmit the record according to law, and the order of court?

4. Did the court err in requiring the defendant to renew his recognizance, he having previously surrendered himself in discharge of his original bail for his appearance to answer the indictment at St. Francois circuit court? Digest 488, section 28. Do. 486, sec. 15. Do. 488, sec. 1-2. 1 vol. Mo. Rep. 191. 1 do. do. 310.

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the county
from which
the change of
venue was taken,
to send up the record.

A writ of error will not lie on the decision of the circuit court in overruling a motion to discharge a debt from his recognizance, such not being a final decision in the cause.

KINSEY vs. WATSON.

In an action by petition in debt, where there has been no personal service of the summons, the debt is entitled to a continuance as a matter of course.

Opinion of the court delivered by Napton Judge.

This was an action under the statute by petition in debt. At the return term of the writ, defendant appeared and plead, and issue was joined: The defendant then moved the court for a continuance on the ground that there was no personal service. The record shows that the facts as

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Watson.

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course.

stated in the motion were true. The motion was overruled and trial had, and verdict and judgment for plaintiff. This court has already held, in a case not yet published, decided in the second judicial district, the name of which is not remembered, that the defendant in such cases, where there has been no personal service, is entitled to a continuance as a matter of course. The judgment is therefore reversed and the cause remanded.

Cole for Appellant.

1st. That the remedy by petition in debt, is only summary where the service of process has been personal.

2nd. That when the service of the writ has not been on the defendant in person, the general practice gives the rule, and the second term is the trial term.

3rd. The general practice is the common law of the land, and the exception will not be extended beyond the letter of the law creating it. 1 Kent Com. 433.

Brickey for Appellee.

1. The only point presented in the bill of exceptions for the consideration of this court, seems to be whether the court below erred in refusing the defendant a continuance on his mere motion for the simple reason that he had not been personally served with process. Digest page 449 petition and summons law. Do. do. 452 sec. 13. Do. do. 457 sec. 2.

2. There was no good cause presented to the court for a continuance of this case, but the mere motion of the defendant for the reasons assigned in his bill of exceptions without any affidavit. Digest 449, sections 4-5.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

FIRST JUDICIAL DISTRICT,

APRIL TERM 1840.

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CAMPBELL AND MAISON VS. HOOD.

1. If a plaintiff includes a person in his suit—whether ex-contractu or ex-delicto—against whom there is no evidence, the court may direct the jury to find a verdict as to such person, and he may then be used as a witness. But there must be an entire want of testimony to justify the court in allowing a party this privilege.
2. In a suit by strangers against persons, charging them as partners, it is not necessary to prove an actual partnership, but only to fix a liability; for a man may not to be a partner in fact, yet by his acts and language he may render himself *liable as a partner*.
3. But when the partners are plaintiffs, or when the suit is between the partners, then a partnership in fact must be proven.
4. To justify a court in setting aside a verdict, merely on the ground that it is unsupported by evidence, the weight of testimony must greatly preponderate against the verdict.

Tompkins Judge dissenting.

Appeal from the circuit court of Cooper county.

Hayden for Appellant.

1st. That Maison was a competent witness, and that the court erred in refusing the defendant Campbell leave to use him as such on the trial of the cause. See 15th Johnson's Rep. 223, Condruson vs. Vanslyck. 14 John 122. Phil. Ev. 61.

2nd. That the court erred in instructing the jury, that

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the law required less, or slighter evidence of the existance of the fact of a partnership between the defendants, than it would require to prove the same fact in a similar contest between strangers—That no such difference exists or can be found in the law. That the fact being the same, the proof is the same, and must be made through the same channel, and by the same means, and cannot be affected by the facility, or want of facility, in making the proof.

3rd. That the jury found a verdict contrary to law and evidence. See Gow. on partnership, 254, top paging, 255 and sequel. See, 14 John Rep 215. 20th do. 176. 1 Cain's Rep 184—1st edition. 2nd Binny's Rep. 245. 2nd Stark. Ev. 582-3 and 6.

4th. That the court erred in refusing to grant defendants a new trial.

Adams for Appellee.

1st. That the evidence of John Hood was relevant, and the court committed no error in not excluding it from the jury. See, his evidence in the bill of exceptions.

2nd. That the court did not err in not permitting the jury to pass upon the case as to the defendant Maison, and in excluding him as a witness. On this point, I refer to the analogous case of joint trespassers. See, 1 Starkie's Ev. top page 111, 5th American Edition. 14 John. Rep 119.—15th J. Rep. 223. 1 Phil. Ev. 61. (1st Wend. Rep. 123, Schemerhorn vs. Schemerhorn.) Bohun vs. Taylor 6 Cowen's Rep. 313.

3rd. The court instructed the jury correctly. See, 3rd Kent's Com. 31, 3rd Edition. Cary on partnership, edited in 14th No. Law Library page 55. 2d Starkie Ev. 585-6. 5th American edition. Gow. on partnership 31.

4th. The motion for a new a trial was properly overruled—Foster and Foster vs. Nowlin, 4 Mo. Rep. 23. 4 ib 861. 4 ib 540. 5th Mo. R. 530. 1 Bibb's Rep. 398. 2d Pirtle Digest 106.

Opinion of the Court delivered by Napton Judge.

This was an action of assumpsit brought by Hood against Campbell and Maison, the appellants, in the Cooper circuit court. The defendants pleaded non assumpsit and set off.

Issue was taken on the plea of non assumpsit, and nil debit replied to the plea of set-off, and a verdict and judgment were given for plaintiff.

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The bill of exceptions preserves the following as the testimony given in the case. It was proved that plaintiff was employed as collecting clerk for the house of Thomas M. Campbell, in Boonville, some time in the month of August 1837, and remained in said employment, until some time in April 1839—that the wages of such clerks varied from \$300 to \$500 per annum. The plaintiff then introduced one Thomas W. Davis, who testified that some seven or eight years ago he was employed as a clerk in said house; that he continued in such employment for four years successively; that said house was at that time a branch of another house then in the town of old Franklin in Howard county; that whilst he was in said employment, the defendant, Maison, took the chief control and management of the business; that whilst he was there, the defendant Maison spent nearly all his time in the branch at old Franklin; that he witness kept the books in the establishment at Boonville, and that there was no account or charge either against Maison or Campbell; that when either got an article no charge was made; that during the time he remained in the establishment, the defendant, Campbell, went to the City of Philadelphia where his father resided, in company with two ladies, and remained some months, and whilst said Campbell was there, in Philadelphia, the said defendant, Maison, went on to Philadelphia and purchased a stock of goods for said establishment. This witness further stated, that Campbell and Maison kept their business secret; that he never heard them talk about it; that they frequently conversed when by themselves.—Witness further stated, that the sign over the door was “Thomas M. Campbell”; that the books and accounts were made out in the name of Thomas M. Campbell; that the business was conducted in the name of Thomas M. Campbell. Witness further stated, that the house he was employed in, was the same for which pl’ff. was employed; that Maison had the management of the establishment at Franklin, and

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performed the duties of clerk; that goods were sent from the house in Franklin to the house in Boonville.

John Hood, a witness on the part of the plaintiff, testified that some years since, the defendant, Maison, wrote to witness, who then lived at Jonesborough, Saline county, for the purpose of employing him as a clerk in the said store at old Franklin. Witness did not recollect whether said Campbell's name was signed by said Maison to said letter or not; that witness went and contracted with said Maison, without consulting Campbell about the contract, and continued to act as clerk in said establishment for three years; that the business was conducted in the name of Thomas M. Campbell, the sign over the door was Thomas M. Campbell, and witness understood that the house in Boonville was a branch of said establishment; that Maison took the chief management of the business whilst witness lived there; that he, (witness,) kept the books of the establishment, and that no account was kept either against Maison or Campbell, and no charge made when either procured articles from the store, and witness never knew of a clerk in a house who was not charged for articles gotten by him. Witness further stated, that there was more mystery about the establishment than any he ever knew; that when he was employed by Maison, he was told not to divulge any thing that he might learn concerning the business of the house. Witness further stated, that on one occasion, during his said employment, defendant Maison told him, that he (Maison,) had never been clerk for any man. The defendant objected to the relevancy of the testimony of said Hood, and moved that he be excluded as a witness; which motion was overruled.

The defendants then introduced two witnesses, who each testified in substance, that they had been acquainted with defendants for a long time; that the said mercantile establishment in Boonville was conducted in the name of Thomas M. Campbell; that all contracts and business transactions relating to the concern were done in the name of said Campbell; that the sign over the door was Thomas M. Campbell, and that said Maison had for several years past acted and still acted as clerk of said Campbell; that said Maison was a

very attentive and diligent clerk; that said Maison came to this country some twelve years since, as a clerk for one Giles M. Samuels. Witness stated that said Maison seemed to take considerable control and management of the said house in Boonville, but never saw any thing in his conduct inconsistent with that of a good clerk. The above embraces the material part of the testimony.

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After closing the testimony, defendants moved the court to send the jury out to pass upon the case of said Maison, that they might find for him upon the issues;—in order that the said Campbell might use the said Maison as a witness upon the trial of the case as to said Campbell. This motion was overruled and defendants excepted.

The defendants then offered to introduce Maison as a witness in the cause, upon the ground that there had been no evidence showing that there was any contract implied or expressed by said Maison for the services of plaintiff, and stated what was proposed to be proved by said Maison. The court also overruled this motion and defendants excepted.

The court then instructed the jury that, "in suits by strangers against partners, a jury might find the existence or fact of partnership upon slighter evidence than was required by law to establish partnership in suits between partners themselves; that as between partners, they had it in their power to preserve evidence of their partnership, but strangers had not."

After a verdict for plaintiff, defendants moved for a new trial, because of mis-instructions of the court; the admission of improper testimony; the refusal of the court to allow the jury to pass upon Maison with a view to have him examined as a witness, and because the verdict was contrary to law and evidence.

There was an affidavit of said defendant, Maison, accompanying the motion for a new trial, which, however, is not found in the bill of exceptions, and therefore forms no part of the record.

The court refused to grant a new trial, and defendant below has appealed to this court.

The first objection, which has been urged by the appel-

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lants, in their assignment of errors, relates to the refusal of the court to exclude the testimony of John Hood, on account of irrelevancy.

There may be portions of Hood's evidence, in relation to the mysterious conduct of the parties defendant, which were objectionable, but such portions should have been objected to at the time, and were not sufficient to authorise the court to reject the entire testimony. Most of the testimony seems to be very much to the point, and I am not prepared to say that any of it was illegal.

The motion to permit the jury to pass upon the case, so far as Maison was concerned, was made with reference to the late act of the legislature, which provides, that in actions upon contracts against several, the plaintiff may recover if he prove any one defendant to have made the contract, (Sess. Acts of 38 & 9 p. 99 § 1.) This provision is supposed to place the case of joint contractors on the same footing with tort feasons, and it is therefore urged that the courts should allow defendants the same privilege now, in actions ex contractu, as have been permitted in actions on tort. This is admitted to be reasonable, and I see no objection to it. But the rule in relation to wrong doers did not

If a plaintiff includes a person in his suit—whether ex-contractu or ex-delicto—against whom there is no evidence, the court may direct the jury to find a verdict as to such person, and he may then be used as a witness. But there must be an entire want of testimony to justify the court in allowing a party this privilege.

allow the court to send out the jury, to pass upon one of the defendants in an action of tort, where there was any evidence against him. On this point the authorities read by the plaintiff's counsel are clear and satisfactory. There must be an entire want of testimony to justify the court in allowing this privilege. 1 Stark. Ev. 111. In Brown vs. Howard, the court said "if there is any, even the slightest evidence, against a defendant he cannot be discharged as a party and received as a witness. The want of evidence against a party, in order to entitle him to be a witness, should be so glaring and obvious, as to afford strong grounds of belief that he was arbitrarily made a defendant to prevent his testimony." 14 John. R. 122. See, also 1 Phil. Ev. 61. 1 Wend. R. 123. 6 Cowen 313.

In this case, there was testimony to prove Maison liable. How much weight that testimony was entitled to, is of no consequence to the decision of this point. There was then,

in my opinion, no error in refusing to let the jury pass upon Maison's liability separately, nor in rejecting his testimony when proffered by defendants.

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The instruction given by the court is objected to, notwithstanding it is admitted that Mr. Starkie and other eminent writers on jurisprudence have laid down the law in nearly the same language used by the court in this case.— It is argued that the same degree of testimony is essential to produce conviction of a fact, in one case as in another; whether the suit be between strangers and partners, or between partners solely, it is contended, the same fact must be proved by the same means, and requires the same quantum of evidence to produce conviction, and consequently the instruction of the court was erroneous. The phraseology of the law writers, in laying down the proposition, that slighter evidence is sufficient to prove a partnership, in a suit between strangers and partners, than in a suit wherein the partners are plaintiffs, is, I admit, open to criticism. It is not because slighter evidence is sufficient to establish the *same* fact in the one case than in the other, but because the same fact is not necessary to be established in both cases, that the doctrine is substantially true. So far as strangers are concerned, it is not necessary to prove an actual partnership, but it is only necessary to fix a liability. A man may not be a partner in fact, and yet by his acts and language he may be *liable as a partner*. He may be considered as a partner legally *pro hac vice* and consequently liable to strangers.

In a suit by strangers against persons, charging them as partners, it is not necessary to prove an actual partnership, but only to fix a liability; for a man may not be a partner in fact, yet by his acts and language he may render himself *liable as a partner*.

But where the partners are plaintiffs, or when the suit is between the partnership, then the matter of fact to prove is a partnership in fact, and of course a different degree of testimony may be requisite, not to establish the same fact as in the other instance, but a different fact. Whatever merit this objection urged by the defendant may be entitled to, it is obvious that it can go no further than the language of the instruction, which for all the purposes of this case, was substantially the law. Cary on Partnership, Law lib. No. 14, p. 55. Gow. 31.

But where the partners are plaintiffs, or when the suit is between the partners then a partnership in fact must be proven.

The only point remaining to be examined relates to the

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refusal to grant a new trial, because the verdict was against the weight of evidence.

I do not think it necessary to enter into a minute investigation of the testimony detailed in this bill of exceptions, I hold, as this court has repeatedly held, that to justify a court in setting aside a verdict merely on the ground that it is unsupported by evidence, the weight of testimony must greatly preponderate against the verdict. A trial by jury would be but an empty mockery, if it were in the power of the judge to set it aside, merely because his mind would have arrived at a different conclusion on the facts submitted. There must be a glaring deficiency of evidence to authorise the granting of a new trial, where there has been no error of law, no mis-instructions, no illegal or improper testimony adduced—can it be denied, in this case, that Maison's own admission, that he had never been clerk for any man, was not a circumstance entitled to some weight in fixing his liability? Was the fact that he was never charged with articles he procured from time to time from the store, of no force to show that he was not a mere clerk? On the other hand, other facts were proved to rebut the influence which might, I think, have been fairly drawn from these circumstances. To determine the relative strength of these conflicting circumstances is the province of a jury, and I am unwilling to disturb their verdict, though I might have arrived at a different conclusion myself. Judge McGirk concurring with me, the judgment of the circuit court is affirmed.

Judge Tompkins dissenting.

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I dissent from the majority of the court. believing that no evidence was given to make Maison liable as a partner.

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1. The purchaser of public lands of the U. S. is governed, in the boundaries and contents of the land purchased, by the act of Congress of 11th Feb'y 1805, "concerning the mode of surveying the public lands of the U. S." which act provides, among other things, that each section or sub-division of section, the contents whereof have been returned by the surveyor general &c., shall be held and considered as containing the exact quantity expressed in such returns, and that the boundary lines actually run and marked in the surveys returned &c., shall be established as the proper boundary lines of the sections and sub-divisions of sections,
2. The act of Congress, of 11th Feb'y 1805, in this respect, declares, in express terms, the rule of the common law, viz: That where land is sold by metes and bounds, the purchaser so takes it, be the quantity more or less; and if the tract contains less than it is sold for, he is without remedy, unless he can prove that the vendor was guilty of fraudulent misrepresentation.

Error to the circuit court of Lafayette county.

W. Adams for Plaintiff.

To reverse the judgment of the circuit court, the plaintiff will insist upon the following points.

1st. That the line running from the half mile corners established by the United States surveyor, was the true boundary between the lands of the plaintiff and defendant.

2nd. That those corners constituted monuments in the boundaries of the respective lands of the plaintiff and defendant, and that the respective quantity of acres of their lands, as well as the courses and distances in the lines bounding the same, were and ought to be governed by those monuments. See, 2nd Mass. Rep. 382, Pernam v. Wead. 6 Mass. Rep. 133, Man and Tobs v. Pearson. 2nd Johns Rep. 40, Starring vs. Defendorf. 1 Cains 493. Hardin's Rep. 542. 1 Marshall 17. 1st Pirtle's digest, 128. 2nd Bibb 494. 4 Bibb 504. 15 Johns. Rep. 471. 5th Binn. Rep. 77. 5th Mass. Rep. 355. 5th Cond. Rep. S. C. U. S. 194.

Burton for Defendant.

1st. That the judgment was given for the right party in the court below.

2nd. That the court has a right to rectify a gross, palpable and evident mistake of the surveyor, in this case arising from the negligence or supineness of the chain carriers or

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surveyor. See 1 Johns Rep. Jackson ex dem Crossett and others vs. Hunter 496 side paging.

3rd. That the court had a right to reject the tree on the south side of said section, purporting to be half mile corner, unless proven to be such by the field notes, or some other evidence further than is introduced in this suit.

4th. That there is no evidence in this cause showing the boundaries of the plaintiff's land, and that the defendant had the same in his possession at the commencement of this suit.

5th. That the court committed no error in the present suit in giving and refusing the instructions assigned for error in this court. See the act of Congress passed May 24th 1820 and the act therein referred to passed in 1805.

Opinion of the court delivered by Tompkins Judge.

Campbell brought an action of ejectment against Clark in the circuit court. The verdict and judgment in that court being against him, he prosecutes this writ of error to reverse the judgment.

Campbell was the purchaser from the United States, of the east half of the south west quarter of section No. twenty-one, in township No. forty-nine, of range No. twenty-eight, in the said county of Lafayette, containing, according to the statement made in his patent, eighty acres. Clark the appellee, who was defendant in the circuit court, seems to be admitted to be the purchaser of the half quarter section lying next east of that of Campbell, appellant and plaintiff in the circuit court.

No evidence was given, or none at least appears on the record, that he, or any under whom he claims, had purchased from the United States. Clark's land, then, would be the west half of the south east of the same section above mentioned.

It appears from the evidence that the quarter section corner established by the deputy surveyors of the United States in the line bounding the section on the south, is twenty poles nearer to the south east corner of the section than it is to the south west corner, and the consequence, according to the witnesses statement, is, that the plaintiff, Campbell, has

in his half quarter section ninety-five acres, and the defendant Clark only sixty-five. To correct this irregularity, Clark claims to establish a new quarter section corner, equally distant from S. E. and S. W. corners of the section and run a direct line from such newly established corner, to the corner of the quarter section in the line bounding the section on the north. This quarter section corner in the northern line is admitted to be in the middle of the line, that is to say, one half mile distant from each corner. For trespasses alledged to have been committed on the disputed ground this action was brought.

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The circuit court instructed the jury as follows: that the lines, dividing a section into quarters, should be run from a point in one of the sides of the section equi-distant from the corners of the section, to a point in the middle betwixt the two corners of the opposite side of the section; and that if the quarter section corners, established in the several sides of the section by the United States surveyors, are not in the middle of the lines connecting the corners, no regard is to be paid to them. And to divide a quarter section into halves, the line must run in like manner from a point in the middle betwixt the quarter section corners, established as above, directed to a point in the middle of the opposite side of the quarter section.

Other instructions were asked by each party; some of which were given, and some refused. That set out above, seems to be the only one material to a correct decision of the cause.

The act of Congress of the 11th of February 1805 settles the question in few words. The second section of that act reads thus. The boundaries and contents of the several sections, half sections, and quarter sections of the public lands of the United States, shall be ascertained in conformity with the following principles, any act, or acts to the contrary notwithstanding: 1st. all the corners marked in the surveys returned by the surveyor general, or by the surveyor of the lands south of the state of Tennessee respectively, shall be established as the proper corners or sub

The purchaser of public lands of the U. S. is governed, in the boundaries and contents of the land purchased, by the act of Congress of 11th Feb'y 1805, "concerning the mode of surveying the public lands

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of the U. S." which act provides, among other things, that each section, or sub-division of section the contents whereof have been returned by the surveyor general &c. shall be held and considered as containing the exact quantity expressed in such returns, and that the boundary lines run & marked in the surveys returned &c. shall be established as the proper boundary lines of the sections and sub-divisions of sections.

The act of Congress, of 11th Feb'y 1805, in this respect, declares, in express terms, the rule of the common law, viz: that where land is sold by metes and bounds, the purchaser so takes it, be the quantity more or less; and if the tract contains less than it is

divisions of sections, which they were intended to designate.

The boundary lines actually run and marked in the surveys by the surveyor general or by the surveyor south of the State of Tennessee, respectively, shall be considered as the proper boundary lines of the sections or sub-divisions, for which they were intended, and the length of such lines as returned by either of the surveyors aforesaid, shall be held and considered as the true length thereof: And the boundary lines which shall not have been actually run, and marked as aforesaid, shall be ascertained by running straight lines from the established corners, to the opposite corresponding corners. The third section proceeds to state that: Each section or sub-division of a section, the contents whereof shall have been, or, by virtue of the first section of this act, shall be returned by the surveyor general, shall be held and considered as containing the exact quantity expressed in such return: and the half sections and quarter sections which shall not have been thus returned, shall be held and considered as containing the one half, and one fourth part respectively of the returned contents of which they make a part."

The act of Congress declares in express terms what I have always understood to be the common law, that is the plain dictate of reason; viz: that land being sold by metes and bounds the purchaser so takes it, be the quantity more or less; and if the tract contain less than it is sold for, he is without remedy, unless he can prove that the vendor was guilty of fraudulent misrepresentation. But that the defendant should claim to make up the deficiency of his half quarter by going on the land of his next neighbor, seems to be a strange doctrine. Nothing hindered Clark from ascertaining the true quantity of land in the quarter section of which he purchased, from the United States, one half; and if he has been careless and given more for the land than it is worth, he is not to expect the man who purchased the adjoining half of a larger quarter to make up his less half. There is no privity of contract betwixt Campbell and Clark; and as Clark would have had no right against Campbell for

this land so he can have no right to take possession of it against Campbell. Clark must take the half of the quarter section in which his land lies. That is to say, he is to find the middle of the northern and southern boundary lines of his quarter section, and his eastern boundary must be a line running directly through the quarter section from the middle of the northern boundary line, and Campbell himself can take only the half of the larger quarter. The judgment of the circuit court is reversed and the cause remanded for further proceedings in conformity to this opinion.

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sold for, he is without remedy, unless he can prove that the vendor was guilty of fraudulent misrepresentation.

KINCAID & FORBES vs. MITCHELL.

Under the provisions of the 1st sect. of the act of Jan'y 28th 1839 (Laws of Mo. session 1838-9.) relating to *forcible entry and detainer*, the proceedings may be removed to the circuit court by certiorari, at any time before the day appointed by the justice for the hearing of the cause, whether that day be the one named in the summons, or a day to which the trial is adjourned.

Appeal from the circuit court of Platte county.

Opinion of the Court delivered by McGirk Judge.

This was an action of forcible entry and detainer brought before a justice of the peace for Platte county. On the day appointed by the justice, in the summons, for the trial of the cause, the parties appeared, and a jury was sworn, who heard the evidence but could not agree in their verdict.—Therefore the justice discharged the jury and appointed a subsequent day for the trial, and adjourned the cause over to that day. About five days before the arrival of that day, the plaintiff removed the cause to the circuit court by a writ of certiorari; when the cause came to the circuit court, the defendant moved the court to dismiss the cause for the reason, that the certiorari would not lie in such a case, and could only lie, where it is presented to the justice before the day set by the justice in the summons for trial; and that the certiorari came too late in this case, although, it was presented to the justice before the day of trial as fixed by the adjournment.

The circuit court sustained this motion and dismissed the cause, and adjudged costs against the plaintiff.

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To reverse this decision the cause is brought to this court. The only error relied on is embraced in the correctness of the dismissal.

The question presented for the consideration of this court is a narrow one, and grows out of the construction to be given to an amendatory act of the General Assembly of this State, passed the 28th January 1839, entitled, "an act to amend an act concerning forcible entry and detainer," see page 45 of acts of the session, 1838-9.

The 1st section of the act declares, that the proceedings under the act to which this act is an amendment, may be removed to the circuit court of the county by certiorari to be issued by the clerk, and served on the justice at any time before the day of trial, subject to the restrictions and limitations hereafter provided. In this case the writ was issued and served on the justice before the day set for trial by the justice's adjournment, but after the day named in the justice's summons, as the day of trial.

Mr. Adams, of counsel for the appellee, Mitchell, insists that the day named in the justices writ, or summons, is the day of trial before which the certiorari must be served on the justice, and that the day appointed by the adjournment is not the day of trial meant by the statute. I think this interpretation of the statute is wrong. It seems to me, that the spirit and intention of the act is that, if at any time before the day arrived, which may be appointed by the justice for hearing the cause, the certiorari is served on him it is in time. The object of the act was to enable the parties to remove their case to a tribunal where more learning in Law matters could be brought in requisition than is usually found before justices of the peace, and the amendment was intended to enable them to do so. But that this should be done in due time before the parties and their witnesses should convene themselves before the justice for the trial. It seems to me nothing is gained by a different construction of the statute; and by requiring the thing to be done the day before, the justice and parties are relieved from further attention to the matter. The words of the statute are, "before the day of trial," is it true that there can be but one

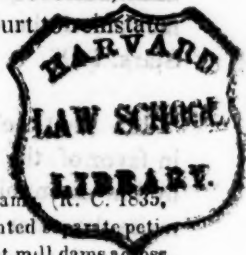
Under the provisions of the 1st sect. of the act of Jan'y 28th 1839 (Laws of Mo. session 1838-9,) relating to forcible entry and detainer the proceedings may be removed to the circuit court by certiorari, at any time before the day appointed by the justice for the hearing of the cause, whether that day be the one named in the summons, or a day to

day of trial? It cannot be true, unless the justice is denied the power of adjourning the cause, and this is not attempted.

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The day named in the summons for the parties to appear before the justice cannot be the day of trial unless a trial takes place, yet the words "the day of trial," are used, nor can any adjourned day be the day of trial, unless a trial actually takes place. According then to the literal words of the statute, no certiorari could ever be taken, for when the cause is removed to the circuit court by such writ there never has been a day of trial at all. Hence, I am of opinion, that the law requires the party to remove his case before a trial is had at all; and to make the matter more convenient to the parties, witnesses, and justice, the party must act at least one day before the day arrives, when the cause is to be heard, tried and determined, no matter whether that day is fixed by the appointment in the justices summons, or by the justices adjournment of the cause. My opinion therefore is, the circuit court of Platte county erred in dismissing the cause, and that the judgment of that court is reversed, and the cause remanded, with directions to that court to restate the cause and proceed to trial.



HOOK vs. SMITH.

Proceedings under the act concerning mills and mill dams (R. C. 1835, p. 405-6-7). H and S each, on the same day, presented separate petitions, to the circuit court, for leave to build different mill dams across the Lamine river. The jury assessed damages, on the petition of H to ten dollars by inundation of the land of S. On the petition of S they returned that no land would be inundated, or other injury done, by the erection of his dam. The site of H was a mile and a half higher up the stream than the site of S. Both cases were heard by the court at the same time. Held, that the circuit court did not improperly exercise its discretion in granting the petition of S and refusing that of H.

McGirk Judge dissenting.

Error to the circuit court of Saline county.

Todd for Plaintiff.

1st. The inquest of the jury is defective in not finding the state of facts with regard to the injury of the navigation

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of the stream, and whether fish would be obstructed in their passage in the stream by the dam, as the Law and his writ required. 5 Littell 338. 1 Marsh, 535, do. 552. 2 Bibb 4.

2nd. From the facts, Hook has in law a right to the free use of the water within his land, for manufacturing purposes, and if he is using it no other individual has a right to injure him by overflowing his land or his works. 3 Kent's Com. 439. 10 Wend. 260. 7 Cowen 266. 17 Johns 306. 1 Bibb 379.

3rd. That his right is a natural and perfect *right* to the use of the water on his land, and the law does not tolerate that it may be taken away for the *convenience* of another, *ibid*.

4th. That it is Smith's misfortune, if his tract of land is too small to contain his desired overflow of water, or his dam too high to restrict him from injuring his neighbor; the maxim is strictly applicable "*sic utere tuo, ut alienum non lædas.*"

5th. That in law there is no division of a judicial day, and Smith has no priority in time, by getting his petition and motion on the record before Hook, on the same day. 3 Stark. 1406.

Miller for Defendant.

1st. That the jury of inquest having in their verdict found in favor of the petitioner, Smith, all those facts which are by law essentially necessary to exist, before the court could make the order in favor the of applicant, it then became a matter of some discretion of the court to refuse, or make an order to build the dam as proposed. R. C. 13 & 14 sec. *Mills and Mill dams*, 18.

2nd. That the court having permitted other testimony to be introduced than the verdict of the jury, upon the trial of the advantages and disadvantages which would result to the community at large, and private individuals, from the dam and mill, as proposed to be erected by Smith, and the bill of exceptions in this case not containing all that evidence, this court will presume, that there was sufficient evidence before the circuit court, upon which it would render a correct judgment and order and that the court upon the evidence

did exercise its discretion soundly and legally. Foster and
Foster vs. Nowlin Mo. R. 2, 18. Coleman vs. McNight,
Mo. R. 4, 83.

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3rd. That the objector Hook, has his legal remedy against Smith for any injury or damage, which may result to him by the erection of a dam by Smith; which legal remedy has not been affected or impaired, by the order of the court, the verdict of the jury, nor by the laws of the State. Revised Code, Mills and Mill Dams, sec. 21. 3 Kent 441.

4. That as Smith's application was prior in time he had the better right.

Opinion of the Court delivered by Tompkins Judge.

Hook, and Smith each, on the 20th day of March in the year 1839, presented a petition to the circuit court of Saline county for leave to build a mill dam across Lamine river in said county of Saline, and in each case a jury was directed to view the premises and make their return to the court.

The jury assessed damages, on Hook's petition, to the amount of ten dollars by inundation of the land of Smith.

In the case of Smith's petition, the jury returned that no land would be inundated, and that no injury would be done to any body by the erection of his dam.

Hook filed objections to the erection of a dam by Smith, and Smith also filed objections to the erection of a dam by Hook.

The court overruled the objections made by Hook to the erection of a dam by Smith, and made an order that Smith have leave to erect a dam ten feet high across the river; and refused permission to Hook to build a dam.

In the bill of exceptions is this statement.

It was known by the judge of the court, and so stated by him, that the petition of Smith was presented, and the order made for the writ prior in point of time, on the day the court made the order in each case for a writ of *ad quod damnum*. It was proved by the objector, Hook, that upon the erection of a dam by the applicant Smith as prayed for, it would overflow the site prayed for upon which to erect his dam, and render such site of no value to him; that it was

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about one and a half miles higher up the stream than the site of Smith. There was no evidence to prove that any other damage would arise from the construction of Smith's dam.

Upon this evidence, the court gave leave to Smith to erect his dam, and build his mill, and overruled the objections made by Hook.

On the side of Hook it is contended, that his site being the highest up the stream, and Smith not being able to raise a dam as high as the order of the court permits him, without overflowing the site of Hook, his petition ought to have been postponed to that of Hook.

It is obvious that either Smith or Hook must yield his pretensions to the privilege of building.

If Smith's pretensions must yield to those of Hook, because he is higher up the river, some one immediately above Hook might claim the preference of Hook, and so on to the head of the river: nobody could have a mill, if it were an objection that another, whose site would be overflowed by the lower dam, wished to build; for it must be recollected, that skill and capital can make a site for a mill on any river.— But the Law makes no account of damage done to one owning the bed of the river, because the water is deepened in the channel by the erection of a dam below. It is when the banks are overflowed, and the adjoining lands are inundated, that damages are allowed to the owner of those lands.

By the finding of jury it appears, that the dam petitioned for by Hook would cause the water to inundate the land of Smith, which in law is esteemed an injury; whereas the dam petitioned for by Smith only deepens the water in the channel which the law accounts no injury. Supposing each mill site of equal value to the public, this was reason enough to justify the court in granting the petition of Smith and in refusing to graut that of Hook.

Proceedings
under the act
concerning
mills and mill
dams, (R. C.
1835, p. 405-
6-7). H and S
each, on the

I make no account of the circumstance that Smith's petition was filed a few hours before the other, or even a few days would have been a matter of indifference in my view.

Both cases were considered by the court at the same time. and very properly at the same time.

The damage assessed to Smith by the jury, on Hooks petition, is so very small, that had the court decided in Hooks favor, I should not have been disposed to disturb its judgment. But the court having decided in favor of Smith, by the erection of whose dam no injury is done to any body by inundation, I am of opinion, that the decision of the court ought to be affirmed. In this case Judge Napton does not sit, and the other Judge differing in opinion from me, the judgment of the circuit court is affirmed in each case. same day, presented separate petitions, to the circuit court, for leave to build different mull dams across the Lamine river. The jury assessed damages, on the petition of H to ten dollars by inundation of the land of S. On the petition of S they returned that no land would be inundated, or other injury done, by the erection of his dam. The site of H was a mile and a half higher up the stream than the site of S.— Both cases were heard by the court at the same time. Held, that the circuit court did not improperly exercise its discretion in granting the petition of S and refusing that of H.

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McGirk Judge dissenting.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

SECOND JUDICIAL DISTRICT,

JUNE TERM 1840.

PLUMMER, deft. & appellant vs. THE STATE plff. & appellee.

Indictment for murder,—first count charged that deft. "feloniously, wilfully, of his malice aforethought and by lying in wait" assaulted &c.—second count, laid the manner and form of killing same as first count, but substituted the words "deliberately and premeditatedly," in lieu of the words "by lying in wait." The jury returned a verdict that defendant was not guilty of murder in either degree in manner and form as charged against him in either count of the indictment, but further found him guilty of manslaughter in the third degree *in manner and form as charged against him in the indictment*. Held, that both under our statute, and at common law, the defendant may be found guilty of manslaughter, on an indictment for murder, as the former offence is included in the latter.—The jury by their verdict negatived the malice aforethought; lying in wait; premeditation, and deliberation, and found the felonious homicide alone, committed in the manner and form charged. (See *The State vs. Watson* 5, V. Mo. R. p. 497.)

Appeal from the circuit court of Lincoln county.

Bates for Appellant.

That the court erred in refusing to grant a new trial because,

1st. The testimony shows a plain case of excusable homicide, this covers the three first reasons assigned for a new trial.

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2nd. The verdict is against law; it being settled by this court that on an indictment for murder, the party may be convicted of manslaughter, I shall not again seek to stir that question, but here the verdict is, guilty of manslaughter in the third degree in manner and form, as charged in the indictment, when there is no such charge.

3rd. The verdict is against the spirit and effect of the instructions; applying the legal effect of the instructions to the facts, the defendant ought to have been acquitted.

4th. The second instruction moved by defendant, ought to have been given, because, although a party indicted for murder may be convicted of manslaughter, still, the jury are not bound to do more than to affirm or deny the guilt of the party as charged.

G. Porter for The State.

Rev. Stat. title Crimes and Punishments Art. 1, sec. 4 and sec. 13 of the same title and article. Also Starkie's Ev. 2 vol. p. 523, and Mo. Dec. vol. 5 State vs. Watson, and State vs. Mallerson

Opinion of the Court delivered by Napton Judge.

Philemon Plummer was indicted for the murder of Joseph Plummer, by the grand jury of the county of Lincoln, at the April term of the circuit court. The first count charged, that defendant feloniously, wilfully, of his malice aforethought, and by lying in wait, assaulted the said Joseph Plummer; and with a large stick did feloniously &c., strike the said Joseph, in and upon, the right side of the head of the said Joseph, and inflicted a mortal wound, of which the said Joseph immediately died; this count concludes in the usual form. The second count, lays the manner and form of the killing in the same way as in the first count, but substitutes the words "deliberately and premeditatedly," in lieu of the words "by lying in wait." On this indictment the jury returned a verdict, that the defendant was not guilty of murder in either degree, in manner and form as charged against him in either count of said indictment, but further found, that defendant was guilty of manslaughter in the third degree, in manner and form as charged against him in the indictment, and assessed his punishment to confinement in the

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penitentiary of the state for the term of three years. The defendant by his counsel then moved the court to set aside the verdict and grant a new trial, for the following reasons: 1. The jury found their verdict against the evidence in the cause. 2. The jury found against the weight of evidence. 3. The jury found without sufficient evidence. 4. The jury found against law. 5. The jury found against the instructions of the court. 6. The court mis-directed the jury and refused to give proper instructions. This motion was overruled by the court, and the case is brought here by appeal. From the bill of exceptions, the following details of the material testimony are copied: A sister of the deceased, Anna Barker, deposed, that on the Sunday before the homicide was committed, the children of Phil. Plummer, defendant, passed by her house, when a black child, a child of the negro woman *Martha*, snatched the bonnet of one of Ph. Plummer's children, and was running away with it; witness gave back the bonnet, and slapped the negro child. The children of P. Plummer went home and reported that one of them had been whipped by the negro child with a switch, while Caty Plummer (wife of deceased,) held a stick over its head to prevent its making resistance. Shortly after this, Phil. Plummer's little son came to witnesses house to get a pair of sheep shears, when witness taxed him with the lies he had told. On Friday evening, Phil. Plummer came to witness' house, and said he understood there was a fray among the children, and wished to know the truth; when some conversation ensued between witness and her brother, the defendant, in relation to this matter; in the course of this conversation, defendant declared that great injustice had been done his children; that lies had been told on them; that if his father upheld the negro woman, he (the father,) would tell a lie as well as the rest. He declared, according to the witness, that *Marth*, the negro woman spoken of, had been ill treating his children for a long time, and he would go over next morning and give the black bitch a hundred lashes, and whoever upheld her, he would lay out with a dirk knife, or any thing he could lay hands on. He declared to witness, that in the winter at hog killing time, Jo's (meaning his bro-

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ther the deceased,) wife, drove off his children, and he had put his dirk in his bosom, and went over to spill her blood. He said that when his children went over to Jo's, Jo's children would ask if they were akin to them, to which their mother (Jo's wife,) would say no, they are negroes, or mulattoes; and Jo would sit there laughing like a fool. This witness testified further, that on the next day after this conversation. between her and Philemon Plummer, which was Saturday about two or three o'clock in the evening, the negro woman, *Marth*, came to her house, and called and told her that Phil. the defendant, had come to the old mans to whip her about the children. She, (the witness,) and Katy Plummer, the wife of Jos. Plummer, started to go, and Joseph Plummer followed, she found the parties in the treading yard, where her father and another brother John, were treading out oats; defendant was sitting on a hogshead with a hickory switch in his hand, witness addressed him and declared she had come to settle the dispute, he replied with an oath, and made at witness with his switch drawn in a menacing attitude &c.; witness caught the switch; he jerked it from her, and drew it again, when Joseph Plummer spoke and said "dont strike her," and as he spoke stooped to come through the bars; (the top rail being up and the rest down,) Phil. said, "damn you, do you take it up," and drew a pitch fork. and struck Joe on the head while he was stooping, Joe did not see the blow struck witness declared, because she heard him, when he came to ask his wife what ailed his head; the blow knocked Joe down for dead; after a while, when rubbed with camphor, he revived and with the aid of his wife walked into the house; shortly after he became very sick and vomited; never spoke after dark and died before morning. Witness declared further, that when the blow was struck she tried to catch the fork but could not, as her father had hold of her by the arm and back. Phil. tried to strike her with the fork; she, witness, did not strike him at all; after he had struck her brother Joe, she picked up a tomahawk that lay on the hogshead, and tried to strike him with it, but her father caught her arm. The pitch fork produced in court and identified by witness, was a forked stick, or sap-

ling, 6 or 7 feet long and about as thick as a man's wrist, roughly shaved as with a drawing knife. Mrs. Barker further declared, that she did not see her father take hold of any person but herself, and after the blow, John, who caught the stick from defendant, said to him "go home, you have killed your poor innocent brother," and Phil. replied "By God, I dont care if I have."

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George Gale testified: that on Saturday, the day Joseph Plummer was killed, he went to old Mr. Plummer's to tread out oats: Philemon Plummer came there, the old man and John being there, Philemon said, "Daddy, you, or John, one, has to fight me; *Marth* (the negro woman) has been telling lies on my children, and Katy Plummer and Anna Barker made the black beat them with sticks"; the black woman came out and said something; Phil. shook a hickory at her, and told her to hush her mouth, or he would give her five hundred lashes. She went back, and Phil. and the old man talked a good while, but witness paid no attention to the conversation; about two hours after Phil. had come there, he, defendant, looked down the road, and said "there, *Marth* has got Katy and Anna to come and make a fuss"; he then told John to whip her, but John refused; he said he defendant, would, and made some motion to that purpose, but was pulled back by his father; he then sat on the hogshhead, with his back to the women as they came up. Mrs. Barker (the first witness,) said she had come up to finish the scrape; defendant said he was ready; she replied she was too, and came through the bars. and struck him two or three times in the mouth. He (defendant,) tried to push her away, he then caught hold of her, held both of her hands with one of his and raised his switch as if to strike her, his father told him not to strike her, and he did not, witness then saw Joseph Plummer come in a run, with a stone in his hand, and defendant caught the pitch fork which the old man had dropped, (or snatched it from the old man's hand, he did not recollect which,) and struck Joe on the head and knocked him down. He held the stick with both hands and by both forks, raising it up and striking right down before him; Joseph was standing erect within and near to the bars, when

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struck, about a yard from the bars; witness did not hear Joseph say a word, nor defendant say any thing about Joe; after the blow, Anna Barker assailed defendant the second time, striking him with her hands, and he struck at her several times with the pitch fork, which John finally took from him; and then Mrs. Barker threw the tomahawk at him. John said to him, "you've knocked Joe in the head," he replied, "no, he's not hurt." The old man told him, (defendant,) to go home, and he went away cursing somebody. Katy Plummer threw a rock at him; defendant in passing through the bars passed close by Joe, but did not seem to notice him; at the time the blow was struck, the old man had hold of Joe by the wrist of the hand which held the rock with both his hands; he stood to one side.

Mr. Barker, the husband of the first witness, testified in relation to a conversation, he heard between his wife and defendant, concerning the quarrel between the negro woman and defendants children, substantially similar to that detailed by his wife. On the day the homicide was committed, witness went to the old man's (Plummers,) and rolled logs with Phil., Joe and John, and finished by breakfast, and every thing seemed friendly between all parties; witness did not remain to breakfast, but went home though he saw his wife and Katy Plummer in the kitchen at the old man's.

Joseph Plummer sr. father of the accused and the deceased, testified: that on Saturday morning, the same day heretofore spoken of, his sons Joseph and Philemon, and his son in law Barker, all of whom lived close by, came to help him roll logs; after getting through, they all went to breakfast, cheerful and in good humor; as they finished breakfast, Anna Barker came in at one door, and defendant went out of the other, whereupon they (the females) said a great deal about his running from them. Witness further declared, that about 2 o'clock in the afternoon, his son Phil. (defendant,) came to the treading yard with two of his children, declaring that he had brought them as witnesses against the negro woman, and wishing him, (witness,) to whip her; witness refused to hear the children make any statement on the subject, but talked a long time with defendant until he seem-

ed entirely pacified and satisfied. He started his children home, and witness presently thereafter saw them coming back, and Anna Barker and Katy Plummer behind them.— Anna came up to Phil. and said she had come to settle the dispute, when def. declared he was ready to settle it any way, so that, he could never hear of it again. John told witness to whip the negro woman for bringing them to make a fuss; witness said nothing. John then told Phil. (def.) to do so, and Anna Barker came up to him and said "I'll have your hearts blood before you shall whip the negro for your lying children," and attacked him; witness caught hold of her, and endeavored to dissuade her from intermeddling further; Joseph then came forward, with a stone, in his hand held up as if to strike and said, "if you strike her I'll split you down with this stone;" witness was alarmed, saw danger, and throwing down the pitch fork, he had been working with, sprang forward and seized Joe's hand, that held the rock; he jerked and struggled to get rid of witness; the blow struck him over witness' shoulder, from behind; his back being to defendant. The deceased, when struck down, was about six feet within the bars, and he and defendant about five feet apart; witness thought deceased intended not to throw the stone, but to strike with it in his hand, deceased and defendant had always been friendly, but their wives had not been on good terms for a year or two.

John Plummer, brother of deceased and defendant, testified to nearly the same facts with his father; but said that the pitch fork was picked up by Anna Barker, after the old man dropped it, and that defendant caught it by both prongs, wrenched it from her and struck the fatal blow: this witness further testified that the defendant went away from the stack yard crying.

This is all the testimony touching the transaction of the day of the homicide; some testimony was given on both sides relating to the conduct of the defendant subsequently to the homicide; one witness testified, that on Monday morning, after the death, defendant came early in the morning to the house of C. Comegys and requested Mr. Comegys to go with him, saying that his brother Joe was

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dead; in this conversation defendant said he had killed his brother on purpose, adding that they had been *deviling* his family for four years, and he expected they would take warning from this and let them alone. The evidence of another witness, who was present at this same conversation, was, that defendant stated he had gone to whip the negro woman about a difficulty with his children; that his sister Mrs. Barker had attacked him with a hatchet, and his brother Joe with a rock, and that he struck his brother with a pitch fork, and his intent was to knock him down when Mrs. Comegys observed, that it was a pity he had not gone before, he replied, according to this second witness, "yes, they had been deviling his family for a long time, he had been trying to sell out, &c., and he reckoned they would take this for a caution. Mrs. Comegys testified in relation to the same conversation, that she asked defendant, if he did it on purpose, to which he replied yes, but seemed in great distress, cried; his voice smothered; his lips and knees trembled.

The physician who attended on the deceased, deposed that the defendant, called on him about night fall and appeared anxious and distressed, and the witness inferred from his appearance that he had swam Cuiver river; upon his arrival he found Joseph Plummer totally insensible, he examined the wound found the skull was not fractured, possibly there was a fissure but no depression; the symptoms he supposed to have been produced by concussion only, and consequent extravasation of blood; supposed the blow to have been slight, or received obliquely; none but the outward integuments were severed; the flesh wound was quarter of an inch deep, and about one inch and a half long on the left parietal bone, extending from a point perpendicular to the ear forward and downward towards the left corner of the forehead; the physician (witness,) declared, he had often seen boys receive worse looking blows, with no fatal consequences; and was of opinion that with such symptoms of concussion with no predisposition to apoplexy, nine out of ten patients would recover.

On this state of testimony, the court at the instance of the attorney for the state, gave the following instruction: If the

jury believe from the evidence, that the prisoner is guilty of manslaughter only, and not of murder, they may so find under the present indictment; and in that case say what degree of manslaughter, and the punishment.

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The defendant, by his counsel, then moved the court to give the following instructions: 1. Under this indictment it is the duty of the jury to decide upon both counts, and whether the accused is guilty, or not guilty of murder in either degree, under either of said counts. 2. And the jury is not bound to consider of the question of manslaughter. 3. If the jury believe in the whole case, that the accused struck the blow under the reasonable apprehension that it was necessary, in order to protect himself from a violent and dangerous assault, they ought to acquit him. 4. If the jury believe from the evidence, that the deceased just before and at the time of, the fatal blow, held a stone in his hand, in position to throw, and threatened to strike the accused, with the stone, they may consider this an assault. 5. If the jury believe from the evidence, that Mrs. Barker and Joseph Plummer, and his wife, came to the place of the affray, with a common object to interfere between Philemon Plummer and the negro woman, and if in pursuance of that common object, only one of the three assaulted and beat P. Plummer, it was in law the assaulting and beating of all three. The court gave all these instructions except the second.

Two questions only are presented to the consideration of this court, by the record: 1st. Is the verdict of the jury in proper form, and second, is that verdict against the evidence or the weight of evidence: First, this court has decided in Watson's case and Mallerson's case, that under an indictment for murder, defendant may be convicted of manslaughter. The grounds of this decision, it is not deemed necessary to review; it is clear, that the provisions of the fourteenth section, of the ninth article, of the act concerning crimes and punishments, cannot be enforced without certain modification and restriction, drawn from the settled rules of practice in the criminal law. If then it be necessary to resort to the common law, to ascertain in what way and to what extent this provision of our statute may be enforced consist-

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Indictment
for murder,—
first count
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defendant
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and by lying
in wait” as-
saulted, &c.—
second count,
laid the man-
ner and form
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same as first
count, but
substituted
the words
“deliberately
and premedi-
tatedly,” in
lieu of the
words “by ly-
ing in wait.”
The jury re-
turned a ver-
dict that de-
fendant was
not guilty of
murder in ei-
ther degree,
in manner &
form as char-
ged against
him in either
count of the
indictment,

ently with established principles of justice, it is not perceived why this court may not resort to the same system, to ascertain the forms by which the provisions of the same code, in relation to homicide, may be enforced. The common law rule, that the allegations and proof must correspond in every material particular, cannot be dispensed with in the application of the 14th section; and whilst by the common law the defendant, in an indictment for murder, could not be convicted of a species of manslaughter entirely dissimilar in character from the murder charged, neither under our statute can this rule be lost sight of; the manslaughter must be contained or included in the indictment, so far as the mode and manner of killing and the instrument with which death is inflicted &c. are concerned, and the defendant must be convicted, if convicted at all, in manner and form as charged in the indictment. The jury, by the common law when they convicted of the manslaughter, negatived the malice aforethought, which constituted the essential ingredient of murder, and under our statute must negative not only the malice, but the lying in wait, and premeditation and deliberation, which have been superadded by our statute, and find the felonious homicide alone, committed in the manner and form charged; the one offence is still presumed to be included in the other, and it is only upon that presumption, that the principle in Mallerson's case, is sustained. The verdict of the jury in this case is exactly in accordance with these principles, and can only be objected to, on the ground that there was no charge of manslaughter in the third degree, as defined by our statute, contained in the indictment, and this objection, I apprehend, resolves itself into the very question which this court has twice decided: there was no error on this point. The question arising on the evidence in this case is one of more difficulty, and the force of the observations of counsel, in relation to the improbability of preserving in a bill of exceptions all the circumstances, which ought and must determine the judgment in the investigation of facts, is most sensibly felt. It is peculiarly applicable to cases, where like the present, it becomes necessary to weigh the credibility of witnesses in

consequence of conflicting testimony; the manner in which the witness gives his testimony, his looks, his gestures and enunciation give a jury great advantages in estimating the truth of his statements, ours is a tribunal which must decide on the probabilities these statements intrinsically possess. Fortunately for the easy attainment of the truth of this case, no question of malice or intent is involved, and it is not difficult to gather from the statements of all the witnesses, a sufficiently accurate account of the occurrences which took place, at the time of the commission of the homicide. The manslaughter of which the defendant has been convicted, is obviously that described in the tenth section of the act concerning crimes and punishments, that section reads: "The killing of another in the heat of passion without a design to effect death, by a dangerous weapon, in any case, except such wherein the killing of another is justifiable or excusable, shall be deemed manslaughter in the third degree." Justifiable homicide is also defined by the same act; that part which relates to the case presented by the evidence on this record is as follows: "when committed in the lawful defence of such person, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury and there shall be imminent danger of such design being accomplished." The design of the thirteenth section above recited, seems to have been to punish that recklessness of human life, which induces men in the heat of passion to resort to dangerous weapons, not in their own defence, but for the punishment of their antagonist.—No intent to kill, and of course no premeditation or malice, is necessary to make out this offence. If a person in the heat of passion resorts to a dangerous weapon and such resort is not necessary to prevent the imminent danger of life, or great bodily harm, the law does not hold the manslayer entirely guiltless. Let us examine the case presented by the testimony on these principles, and for this purpose it will not be necessary to ascertain with certainty the previous declarations of the defendant, or his conduct and declarations subsequent to the commission of the homicide. With this view, I apprehend, that the statements of George Gayle,

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but further found him guilty of manslaughter in the third degree in manner and form as charged against him in the indictment. Held, that both under our statute, and the common law, the defendant may be found guilty of manslaughter, on an indictment for murder, as the former offence is included in the latter. The jury by their verdict negatived the malice aforethought; lying in wait; premeditation, and deliberation, found the felonious homicide alone, committed in the manner and form charged. (see The State vs. Watson 5 v. Mo. R. p. 497)

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a witness, who was disinterested and disconnected with any of the parties to the affray, is most to be relied upon. The statement of Mrs. Barker the sister of the accused and the deceased, contains some intrinsic inconsistencies, and, upon the whole, seems to be somewhat tainted with a feeling of ill will to the accused, and must be taken with many grains of allowance, except where it is corroborated by the statements of the witness Gayle; the same observation will to some extent, apply to the testimony of the father and brother of the accused, who without ceasing to mourn the loss of the deceased, may be charitably supposed to retain the feelings of compassion for the prisoner, so natural to persons in their situation. Without undertaking to decide how far the statements of Mrs. Barker may be relied on, in relation to the declarations made by the defendant, about his father and brother and all who would interfere between him and the negro woman, by whom his children had been insulted, it may be assumed, that the defendant went to the stack yard, on the morning of the fatal rencontre, with a view to redress certain supposed grievances, and with the instrument of punishment in his hands. He went in no very calm mood. The testimony of Gayle says, he proposed a fight with his father or brother John, so soon as he arrived, but the evidence of the old man and his son John countenances the idea, that he came proposing to submit his grievances to his father. However this may have been, his father succeeded in calming his passion, and he remained for some time apparently satisfied with the result, though he did not succeed in his avowed object, the chastisement of the female slave. About two hours after defendant arrived, his attention it seems, was arrested by the approach of his sister, Mrs. Barker, and his sister in law the wife of Joseph Plummer; he seemed entirely satisfied of their object in coming, and what had brought them there. He charged that the negro woman had brought them to make a fuss. He attempted to chastise the negro woman, for this impertinent interference, but was prevented by his father. His sister Mrs. Barker, by this time, approached and observed she had come to settle the quarrel, and after some answer from the

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defendant, she struck him several times in the face with her hand; defendant caught her hands, and held them in one of his, and raised the hickory switch he had brought for the chastisement of the slave, over his sister; about this time Joseph Plummer appears, and is seen approaching with a stone in his hand, and in a threatening attitude, declaring, according to the testimony of the father, that if his sister was struck he would "split defendant down with a stone," but according to the statement of Gayle saying nothing. The father immediately seized his son Joseph by his hand that held the rock, with both his hands, and whilst Joseph was in this situation, he was struck by the defendant the fatal blow.

That a pitchfork made of hickory, four or five feet long, is a *dangerous weapon*, within the meaning of the statute, I can entertain no doubt. In the hands of an athletic young man, with his antagonist at the distance of a few feet, a more dangerous weapon could not be readily conceived; had the defendant then, at the time he gave the blow, a reasonable apprehension that his life was in danger, or was he in imminent danger of bodily harm? I am constrained to believe that this was not so. To create this reasonable apprehension, there must be a manifest disposition to assault, coupled with a manifest ability to do so; the disposition of Joseph Plummer to assault his brother the defendant, with the stone which he held, may be inferred, from his menacing attitude and his threats. If his threat, however, which was conditional and its execution depended on defendant's striking his sister with the hickory switch, ought to have been so considered, by defendant, there was no good ground, that defendant should anticipate an attack, as he could avoid one on such easy, and one would suppose honorable terms. I suppose that even the defendant could not imagine that any dishonor would attach to his retreat from the impotent attacks of a female, and that female his sister. But supposing that the defendant had a right to regard the threats, if any such were made, as conditional and the menacing gestures of his brother Joseph as confirmatory of that idea, had he any just and reasonable grounds to apprehend the *immediate execution* of that threat? His father.

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it seems, had hold by both hands of the arm of Joseph Plummer which held the rock, there was no *present ability* on the part of Joseph Plummer, to execute his design, and the want of that ability must have been, or ought to have been, *apparent* to defendant. Can we for a moment suppose, that if the object of defendant had been merely self defence, he could not easily have attained that object by aiding his father in securing and holding his brother Joseph? and was there thing even chivalrous in declining a combat with a brother?

On the contrary, it seems plain that the defendant struck, not with a view to kill, but at least to punish, and as he afterwards observed to give a caution to his brother, for his supposed improper interference in his affairs. That the jury were justified in taking this view of the case, is strongly confirmed by the subsequent declarations of the defendant himself. He no where attempts to justify himself on the ground of self defence, but places his justification on the ground that he did not intend to kill, but aimed to give a *warning* which he thought would have a wholesome influence. This I apprehend is the very thing against which our statute is directed. This recklessness of a brother's blood, the law regards as contrary to social duty and worthy of punishment. The court instructed the jury, that Mrs. Barker's assault was in legal contemplation, the assault of Joseph Plummer, provided they believed there was a concerted design on the part of both to attack defendant.— But what evidence was there of any such concert? That Joseph Plummer should have followed his sister and his wife to the place where their meddlesome propensities carried them, with a view to their protection and defence, does not surely argue a preconcerted design against defendant.— The brothers Joseph and Philemon seem to have been on good terms, though their wives had quarrelled; and that a man should be found in company with his wife and sister, and even raising a stone to protect them or punish their assailant, in a quarrel brought on by their own imprudence cannot establish a conspiracy on his part, and the jury have well negatived any such concert and design.

This I imagine is the mildest light in which defendants conduct can be viewed; taking the statement of the witnesses most favorable to his acquittal. If the testimony of Mrs. Barker had been regarded by the jury, they could scarcely have negatived all idea of malice, or intent to kill, as they have done. The instructions given by the court, at the instance of the defendants counsel, were sufficiently clear and explicit to prevent any doubts from arising on the minds of the jury as to the intent and nature of their duties, and the proper marks of the offence which the testimony goes to establish. The verdict of that jury, does not appear from any testimony on this record, to be contrary to the weight of evidence, and the form and substance of the law having been complied with, this court has no power to disturb that verdict. The judgment of the circuit court is therefore affirmed.

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HUGHES adm'r of McKinney vs. GRISWOLD.

H. administered on the estate of M. in Warren county, and applied to the county court of that county for leave to sell lands of the estate, to satisfy certain demands against the estate, which had been allowed and ordered to be paid, by the circuit court of Franklin co. G. the appellee, made objections to the application which were sustained; the adm'r. appealed to the circuit court of W. co. and the judgment of the county court was affirmed; the adm'r then appealed to this court. It not appearing, from the record, how the circuit court of Franklin county obtained its jurisdiction herein, the judgment of the circuit court of Warren co. was affirmed.

Appeal from the circuit court of Warren county.

Bates for Appellant.

1. That the court went behind the judgments of the Franklin circuit court, and enquired into the original merits of the claims thereby ascertained.
2. The court permitted the objector to give in evidence the Indiana record, upon which the Franklin judgments were founded, and enquired into the legality and regularity thereof.
3. The court admitted parol evidence to impeach the justice and legality of the Franklin judgments, and herein it

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may be added, that the court required Hughes and McKinney, one the legal party and not admissible, and the other the virtual party and not compellible, to be witnesses.

4. The court illegally refused the order of sale.

1st. On the first point: The Franklin judgments were conclusive. R. C. art. 4, p. 55, § 3, 8, 13, &c. R. C. appeals, p. 62, and § 8, 9. Sale of real estate, art. 3, § 8, &c.

2nd. On the second point: The Indiana records could not be reviewed on the petition to sell the land; whether they did or did not, lawfully prove the debts, was a question for the Franklin circuit court, and if that court erred the way of redress was plain. Judgments of the courts of other states where general and the proper party has notice are conclusive. 1 Kent's Com. 244. 7 Cranch 421. Wheat. 224. When special and in rem, and deft. had no actual notice, not conclusive, 3 Wheat. 129. Mayhen vs Thatcher. Evidence in pais inadmissible to invalidate the record of a judgment. Mo. Rep. 5 vol. p. 233, Montgomery vs. Fairly et al.

3rd. On the 3rd point: No evidence, written or verbal could be received to impeach the Franklin judgments in this collateral proceeding, which is not a case pending between parties, but a precautionary examination in relation to an act, purely ministerial, viz: the sale of property to pay debts judicially ascertained: our act requires notice to all persons interested in the estate, and permits the court to satisfy its conscience, to examine all the parties, "if necessary" on oath. Even in case of flagrant fraud, a judgment could not be set aside, on such evidence, and in this collateral way. In a case in N. Y. (20 J. R. 296,) the court would not set aside a judgment, nor stay execution, on the ground of fraud, at the instance of a creditor at large, i. e. whose debt was not ascertained by judgment. See also, 6 J. R. 296, Denton vs. Noyes. It could not be necessary to examine Hughes and McKinney, and their testimony was illegal.

4th. On the 4th point: The testimony very improperly received. The granting of the order of sale, ought to have been a matter of course, for the law does not require the

administrator to produce any evidence. Under the N. Y. Statutes it is irregular, to issue a ca. sa. before a fi. fa. yet the party only can take advantage of it, and not the sheriff against whom action has been brought for an escape, 13 J. R. 370. Ib. 599.

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Wells for Appellee.

1st. There was no legal evidence before the county court that any demands had been lawfully allowed against said estate. The only evidence of allowance of demands before the county court, was a transcript of 4 judgments from the circuit court of Franklin county, all certified by one certificate; one in favor of John Green, to the use of Alexander McKinney, for \$119,10; one in favor of Alexander McKinney jr. to the use of Alexander McKinney, for \$50,11; one in favor of Ja's. McKinney to the use of Alex'r., for \$90,41, and one in favor of Alexander Wallace, to the use of Alexander McKinney, for \$1289,30½. In cases of appeals from the county to the circuit court, the statute requires, that the clerk of the circuit court shall certify a transcript of the record and proceedings, and the original papers, to the court wherein the appeal was taken, which shall proceed according to the decision of the circuit court. See laws of Mo. p. 64, § 9: here nothing is sent but a copy of the judgments. In all cases the common law requires a full transcript of the record. See Peaks ev. 34. 2 Mo. Dec. 119. Law ev. 17, 23, 27.

2nd. There is no legal evidence that any demands have been allowed which are entitled to be paid out of moneys arising from the sale of real estate hereafter to be made.—The law requires the county court to class all demands, and provides, that they shall be paid according to their classification, see Mo. L. p. 57, § 19-20-21. The law requires the circuit court, on appeals, to make the same *order or decision* that the county court ought to have made, see Mo. L. p. 64 § 8. The circuit court of Franklin allowed the above demands, and ordered them to be paid out of the assets in the hands of the administrator.

3rd. The circuit court of Franklin had no jurisdiction over the cases. See Mo. L. p. 156, § 15.

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4th. The allowance of the claims in Franklin was the result of a fraudulent collusion between the equitable plaintiff and the adm'r. See bill of exceptions, McKinney's and Hughes evidence. It was the duty of adm'r to defend on all legal grounds.

5th. The allowance of said claims in Franklin, is not conclusive against Griswold, he being no party thereto, see Rob. practice, 1 vol. 368-9-313. He has a right now to enquire into the legality of said allowance. See 4th Bibb 320.

Having a right to look beyond the record of allowance, he shows the following defect in such proceedings:

1st. It does not appear that any adm'r was ever appointed in Indiana.

2nd It does not appear that any letters were ever granted to the persons who acted in Indiana.

3rd. It does not appear that said demands were ever examined, or allowed, or ordered to be paid by the probate court of Indiana.

4th. There are no judgments, or orders of payment in favor of said plaintiffs in Indiana, or either of them.

5th. There are no such debts in the Indiana record as those allowed by the Franklin circuit.

6th. The allowance to Wallace in Indiana, was to him as adm'r of David McKinney dec'd. The allowance of \$14,564 was to Alexander McKinney dec'd., he cannot now recover it here in his own name, see 1 Cranch 259. 3 do. 319. 2 Kent 247 fl.

7. Judgments or orders of allowance against Robert McKinney's adm'r's in Indiana are not conclusive, or in any manner binding on Rob't McKinney's adm'r's here, he not being a party or privy thereto. See Story's conflict, p. 436, sec. 522. 4 Bibb 320.

8th. The record from Indiana is not certified to be the whole record in the cause—some of these debts, or parts thereof, may have been paid.

9th. Said claims not being evidence by legal record are barred by the statute of limitations.

10th. The lands in the hands of third persons, who pur-

chased of the heirs without notice of the debts against the estate, are not liable thereto after so great a lapse of time, 6 J. C. R. 689. 5 U. S. C. R. 237. 7 Wheaton 60.

11th. The allowance in Franklin is in other respects illegal, irregular and void, as to Griswold,

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Opinion of the court delivered by Tompkins Judge.

Hughes administered in Warren county on the estate of Robert McKinney; he applied to the county court for leave to sell land belonging to the estate of the deceased, representing to said court, that the personal estate of the deceased was insufficient to pay the debts. Griswold made objections to the rule, which being sustained by the court, the administrator appealed to the circuit court, where the judgment of the county court was affirmed. From the bill of exceptions in the cause we learn, that Hughes the administrator petitioned for leave to sell land to satisfy certain demands against the estate of his infestate, which had been allowed and ordered to be paid by the circuit court of Franklin county. It no where appears on the record of the cause, now before this court, how the circuit court of Franklin county obtained jurisdiction of any demands against the estate of Robert McKinney, which had been administered on, in Warren county. For this reason the judgment of the circuit court of Warren county, affirming the judgment of the county court of that county, is itself affirmed, all the members of this court concurring.

appealed to the circuit court of W. co. and the judgment of the county court was affirmed; the adm'r then appealed to this court. It not appearing, from the record, how the circuit court of Franklin county obtained its jurisdiction herein, the judgment of the circuit court of Warren co. was affirmed.

H. administered on the estate of M in Warren co. & applied to the county court of that county for leave to sell lands of the estate, to satisfy certain demands against the estate, which had been allowed and ordered to be paid, by the circuit court of Franklin co. G. the appellee, made objections to the application which were sustained; the adm'r court was af-

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Craig
vs.
Maupin.

CRAIG Appellant vs. MAUPIN Appellee.

It has been a rule of proceeding, in the Sup. Court, to suffer verdicts, whether found by the circuit court, or by a jury acting under the direction of that court, to stand, unless it were quite obvious that injustice had been done.

Appeal from Marion circuit court.

C. H. Allen for Appellant.

1. Tresspass will not lie where there is an authority given to enter on the lands of the plaintiff, and to cut and carry off timber until the defendant is satisfied. See 13th Johnsons' reports 414, 1 p.

2. The permission given by plff. was general and unrestricted, and plff. cannot recover in any form of action, much less trespass.

S. T. Glover for Appellee.

1. The court committed no error in refusing to instruct the jury to find as in case of a non suit.

2. The verdict was in accordance with the evidence in the cause.

Opinion of the Court delivered by Tompkins Judge.

Maupin brought his action against Craig before a justice of the peace. The justice gave judgment against Maupin, and he appealed to the circuit court; that court gave judgment for Maupin and Craig appeals from the judgment of the circuit court to this court. The plaintiff filed his account against the defendant for nineteen timber trees, estimated at thirty dollars. The defendant claimed as an offset eleven dollars and 25 cents; for work and labor done, and five timber trees; the plaintiff Maupin, appellee here, produced a witness, who proved that some time in the year 1837, this witness himself informed the plaintiff, that the defendant requested the witness to tell the plaintiff, that he wished a settlement with him, and that the plaintiff replied, that he had no settlement to make with the defendant; that he owed the defendant five or six timber trees, and that he told the witness to tell the defendant to cut timber until he was satisfied; and that after being so told, the defendant cut and carried away nineteen trees. The witness stated that three trees were worth one dollar and fifty cents each. The

defendant then proved work and labor done for the plaintiff which he estimates, as above stated, at eleven dollars and 25 cents. The plaintiff gave some evidence to prove that the work and labor done for him were not worth as much as defendant charged for it; nothing that was entitled to the appellation of instructions was asked of the court. The first jury, before the justice of the peace, gave the defendant one cent damages. The circuit court in the second instance, acting as a jury, gave the plaintiff one cent damages. So far as I can judge from the evidence, neither acted amiss; if either did so at all. It, however, rather seems to me that the latter judgment ought to stand, and therefore that the appellants motion for a new trial ought not to prevail. Charity, at all events, requires at the hands of this court, that the parties ought not to be suffered longer to injure themselves and each other by such useless litigation. It has long been a

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acting under the direction of that court, to stand, unless it were quite obvious that injustice had been done. It has been a rule of proceeding, in the Sup. Court, to suffer verdicts, whether found by the circuit court, or by a jury acting under the direction of that court, to stand, unless it were quite obvious that injustice had been done.

MURRAY Appellant, v. FARTHING Appellee.

M. contracted with F. for two hundred pork barrels, of the ordinary size and quality. M. afterwards received of F. that number of barrels, but not of the size and quality contracted for, nor in discharge of the contract. Held, that M. was liable for the barrels received, according to their common selling price.

Appeal from Monroe circuit court.

Heard for Appellant.

1st. The verdict was contrary to the evidence in the cause.

2d. That the damages assessed by the jury were excessive.

3d. That the verdict was against law.

Howell for Appellee,

Cites 2nd Chittys pleadings, notes 75 and authorities ci-

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ted. 1st Stark. 275. 6 Taunt. 322. 1 Marsh. 581. 4 Taunt 745. 2 Taunt. 150. Blk. Rept. 103. Starkie vol. 3, p. 1769. Pirtle dig. 222. 6 Monroe 612 to 615. Marford vs Martin &c. Pirtle 225 and 226. 2 Starkie Ev. 641. 2 J. J. Marshall, 593, 594, Dance vs. Boyd. 5th vol. M. D. 487, Mulliken vs. Greer, same Vaughn vs. Montgomery 529. 4 vol. M. D. 275. Oldham vs. Henderson and the adjudged cases in this court, M'Knight and Brady vs. Wells, 1 vol. M. D. 14.

Opinion of the Court delivered by McGirk Judge.

Farthing, the plaintiff in the court below, brought an action of assumpsit in the circuit court of Monroe county to recover the value of two hundred pork barrels, before the bringing of the action, by him delivered to Farthing; plea non assumpsit; on this pleading the parties went to trial before a jury, and the jury found a verdict for the plaintiff for two hundred and seventy-five dollars and fifty cents; whereon, the defendant moved for a new trial, because the verdict was contrary to law and evidence, and the damages excessive; which motion was overruled; to reverse which

M. contracted with F. for two hundred pork barrels, of the ordinary size & quality. M. afterwards received of F. that number of barrels, but not of the size and quality contracted for, nor in discharge of the contract. Held, that M. was liable for the barrels received, according to their common selling price.

the cause is brought to this court. It seems, by the bill of exceptions, that some time in 1838, the plaintiff and defendant made a bargain, that the plaintiff was to make at his shop for the defendant two hundred pork barrels of the ordinary size and quality; that the plaintiff did not make the barrels as he agreed to do, but that the plaintiff made two hundred of a different quality and size from those agreed on. Before the defendant took them, he saw them, and was told by a witness what sort of barrels they were. He, nevertheless took them and put pork in the most of them, sold 60, and threw 13 away as useless. There was some proof that three barrels would not hold brine, but the defendant put his pork in them, and sold it without loss. The fact that the barrels were not made according to the contract makes no sort of difference in this case, as the defendant appears not to have received these barrels on that agreement, but he took them out of the agreement, and he is bound now to pay for them according to their common selling price. The jury have deducted thirteen dollars from the 200 that makes

the amount of the verdict at \$1,50 per barrel, without any interest. It seems, therefore, to the court that the verdict is about right.

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Pearson.

GALE Def't. and Appellant v. PEARSON Pl'ff. and Appellee.

To enable the Sup. Court to determine whether or not the circuit court has erred in its judgment, it is necessary to preserve the evidence and proceedings in a bill of exceptions.

Appeal from the circuit court of Audrain county.

P. Williams for Appellant.

1st. From the evidence the verdict is wrong. 3 vol. Mo. Rep. page 464, Lightner vs. Mann.

2nd. The court misinstructed the jury.

J. R. Abernathy for Appellee.

1st. The jury was warranted in finding a verdict for plaintiff below on the evidence there given.

2nd. The court did right to refuse a new trial, see 3rd vol. Mo. rep. 464, Lightner vs Mann. 1 vol. do. 14 Mc-Night vs. Brady and Wells. 4 vol. do. 295, Oldham vs Henderson. Hardwich vs Holmes decided at Oct. term of this court 1839, at Palmyra.

Opinion of the Court delivered by Tompkins Judge.

Pearson, sued Gale before a justice of the peace, where he obtained judgment; Gale appealed from the justice to the circuit court of Audrain county, where he again had a judgment rendered in his favor, and Gale now appeals to this court. The counsel, of Gale complains, in his brief, of certain acts of the circuit court done to his injury, as that the court misinstructed the jury, and refused to allow him to have a new trial. There is no bill of exceptions in the record. The clerk has written out on the record, something that he calls instructions given by the court, and on a small piece of paper presented to this court, to which the name of one of the circuit judges of the State of Missouri is subscribed, we find these words: "To which instructions, considered together, the def't excepted, the jury found for pl'tff.—The def't. then filed his motion for a new trial in the cause,

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v.
Pearson.

To enable
the Sup Court
to determine
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the circuit
court has er-
red in its
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to preserve
the evidence
and proceed-
ings in a bill of exceptions.

which instructions given by the plaintiff, see copied immediately below; which motion was overruled by the court; to which opinion of the court the deft. excepts and prays that his bill of exceptions &c." the slip of paper on which is the above writing is separate and detached from the record of the case. The counsel for the appellant, if this paper contained any part of the record of the cause, ought to have alleged a dimmution of the record, and to have applied to this court, for a writ commanding the circuit court to send up the record, there being no bill of exceptions before the court to show any error that the circuit may have committed. Its judgment is affirmed.

STOUT Appellant, v. CALVER Appellee.

1. It is no ground for a new trial, that the party "was surprised by the cause coming on sooner than he expected; he believing the cause was set for trial on the third, instead of the first day of the term."—The party was guilty of negligence in not examining the docket, and ascertaining the time when the cause was set for trial.
2. Although it is error in the circuit court to enter judgment without a finding upon all the material issues in the cause, yet, the finding may be in general terms; as, "we the jury find for the plaintiff, and assess his damages to &c."

Appeal from the Marion circuit court.

U. Wright for Appellant.

1st. I submit that the 4th ground of the motion, presented good cause for a new trial, and that the refusal was an improper exercise of the discretion of the court.

2d. Independent of this ground the verdict was wrong

3d. The issues are not found by the verdict; the set off is not noticed, and the error is fatal. See *Rogers vs. Pratt* decided by this court from which this cause is not distinguishable, also *Leak vs. Elliott*, and *Jones vs. Snedegar adm'r*, 3 vol. M. D. It is not like the case of *Davidson vs. Peck*.

T. L. Anderson for appellee.

See *Smith vs. Morrison* 3 Marsh. Rep. p. 85. 2 vol. Tidd 816. 1 Bibb's Rep's. 671. 1 Sellons practice 488. 1 Bibb's

Rep. 247-251. 2 Burrows Rep. 230. 3 Durnford and East. 659. 4 vol. D. S. C. Mo. 445.

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Opinion of the Court delivered by Tompkins Judge.

Stout
vs.
Calvin.

Calver brought his action of assumpsit against Stout in the circuit court of Marion county, and judgment being given for him in that court, Stout appeals to this court.

The action, as above stated, is assumpsit. The pleas were non assumpsit and set off. The finding of the jury is, "we of the jury find for the plaintiff, and assess his damages to the sum of &c." Judgment being given for the plaintiff, defendant moved for a new trial, having filed his affidavit of merit, and alledging that he was surprised by the cause coming on sooner than he expected; that he had believed the cause was set for trial on the third day of the term, whereas it was set for trial on the first day of the term.—The ground of surprise is something new; it is a universally admitted pinciple that no person is entitled to a new trial unless he has used due diligence to procure evidence. Apply the same rule to the present case, and we may say the defendant ought to have walked to the clerk's office, and to have seen, on the docket itself, the time when the cause was set for trial. If new trials are to be granted for such reasons as this, trial becomes a farce, and consequently all proceedings to obtain a judgment will be mere nullities. The second objection taken is that the jury has not found all the issues made. The finding is for the plaintiff generally; according to the practice of the English courts such finding was good. See Sellons practice 480, and 3 Darnford and East. 659, the case is Petrie and another ex'rs vs Hannay.—

It is no ground for a new trial, that the party "was surprised by the cause coming on sooner than he expected; he believing the cause was set for trial on the third, instead of the first day of the term."—The party was guilty of negligence in not examining the docket, and ascertaining the time when the cause was set for trial.

The action was assumpsit, for money paid by testator to the use of the defendant, and for money had and received by the defendant to the use of the plaintiffs as executors. The defendant pleaded the general issue, and the statute of limitations. The court held that the omission to enter up a verdict on the second plea was a mere clerical omission.—To the same purpose, see Worford vs. Ishel. 1st Bibb's Kentucky reports 247 and 251: at the last page Judge Bibb cites the case of Hawker vs. Crafton. 2 Burrow where in an action for an assault and battery, upon the issues of not

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guilty and son assault demesne the jury found the defendant generally guilty "of the trespass within written." The court upon solemn argument held unanimously that the finding was sufficient, and the judgment was affirmed. But the appellant relies on three cases decided in this court, to sustain him in his objection to the sufficiency of the finding in the case under consideration, viz: Jones and Jones vs. Snedegar, 3rd Mo. dec. p. 390, Rogers vs. Pratt, page 52 of the 5th vol. of Mo. dec. isions, and Leak vs. Elliott which last has been twice brought into this court. See 4th and 5th volumes, and in neither volume do I find any thing decided that bears on this case.— In the case of Jones and Jones vs. Snedegar the action was by petition and summons, a statutory remedy; the defendant pleaded payment and set off, the court acting as a jury found that the defendants were indebted to the plaintiff in the sum of two hundred and twenty one dollars, the debt in the petition mentioned, and then assessed damages for the detention thereof. In Rogers vs. Pratt the action was petition in debt, this action since the decision of Jones and Jones vs. Snedegar had been a little modified by law, but the change was more in name than in substance. The pleas in this last case, were non assumpsit and set off. The court again acting as a jury, finds for the plaintiff the sum of three hundred and fifty two dollars, &c., the debt in the said petition mentioned. In both of these cases, the finding of the court excludes the idea that jury had taken into consideration at all the plea of set off; whereas in the case now under the consideration of this court, the finding is for the plaintiff generally, a finding perfectly consistent with the idea that the jury had considered the defendants plea of set off, and had come to the conclusion, that he was not entitled to any credit on that plea. The authorities cited from the English and Kentucky books show that in such cases the finding is well enough to support a judgment. The judgment of the circuit court for the reasons above given ought in my opinion to be affirmed, and Judge Napton concurring in that opinion it is affirmed.

Although it is error in the circuit court to enter judgment without a finding upon all the material issues in the cause, yet, the finding may be in general terms as, "we the jury find for the plaintiff, and assess his damages to &c."

M'Girk Judge dissenting.

In this case, I am of opinion, that the set off was not con-

sidered by the court, and for that reason the judgment ought to be reversed.

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Pennington
vs.
Castleman.

PENNINGTON V. CASTLEMAN.

The 2nd article of the statute of limitations, (R. C. 1835, p. 393-4,) does not embrace actions of covenant, consequently the limitation of ten years is not a good plea to an action of covenant, brought upon a sealed instrument of writing for the payment of money. The limitation of twenty years, however, is a good plea, and is embraced within the provisions of the 2nd section of 4th article of the act.

Error to Lincoln county.

S. T. Glover for Plaintiff in Error.

1st. The action was well brought on the writing sued on; covenant lies on it. 1 Chitty's Pl. 131, 2 and 3. 2nd T. Com. 120. 1 Bibb 3S3. 2 Jacob Law Dic. 118.

2d. The breaches in each count of the declaration are well assigned, being in the words of the covenant. 1 Chitty Pl. 408-9. Ib. 365. 2 Tuck. Com. 125. 4 Mo. Dec. 221-2.

3d. Previous to the 4th year of James 1st there was no limitation in England, to actions on sealed instruments, though a presumption of payment arose after twenty years. See Stat. 21. Jac. 1 c. 16. as given in 4 Bacon's abrig. 470. 1 Bal. lim. 86, 78.

4th. Nothing less than twenty years time could have affected this action in England previous to the 4th James 1st, and so the law remains unless changed by the new code, 1834-5.

5th. That law cannot upon any principle of just construction change the law. See Rev. Code 1834-5, p. 393. Ib. 396. 7 Kent's Com. 460-1-2. 1 Selwyn N. P. p. 520.

C. Wells for Defendant.

1st. The statute of limitations is a good plea to an action of covenant brought on such a writing. See 2 Cranch p. 336. 2 Robinson's practice 251.

2d. The second count is liable to the same objections.

JEAN TERM
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Pennington
vs.
Castleman.

Opinion of the Court delivered by McGirk Judge.

Pennington brought an action of covenant against Castleman on a sealed instrument for the payment of money, for about the sum of 837 dollars. There are two counts in the declaration. The defendant pleaded, first, *non est factum*; 2d. limitation of ten years; two pleas of payment: issues were taken on the 1st, 3rd and 4th pleas. The plaintiff demurred to the second plea of the statute of limitations; the court overruled the plaintiff's demurrer, held the plea good, and gave judgment against the plaintiff. The cause is brought here by a writ of error. The point insisted on, by the counsel for the plaintiff in error, is that the court erred in overruling the demurrer to the second plea. His argument is, that the statute of limitations contains no limitations of the action of covenant for the payment of money, or any thing else; and not being within the words of the act, there is no reason in equity, policy or justice, why the supposed spirit of the act should be resorted to, to embrace the action of covenant. On the other side it is contended, that the action of covenant, when founded on a sealed instrument for the payment of money, is as much within the meaning and spirit of the act, as it would be if it had been expressly named in the act. I will proceed to examine the matter of law contained in this proposition. By the

The 2d art. of the statute of limitations (R. C. 1:35, p. 392-4.) does not embrace actions of covenant; consequently the limitation of ten years is not a good plea to an action of covenant, brought upon a sealed instrument of writing for the payment of money.—The limitation of twenty years, however, is a good

1st sect. of the 2nd art. of 1235, entitled, limitation of actions, R. C. 393, it is enacted thus: The following actions shall be commenced within ten years, after the cause of such action accrued and not after, 1st. all actions of debt founded on any writing, whether sealed or unsealed. 2nd, actions of assumpsit, founded on any writing for the direct payment of money. The statute then goes on to limit nearly all other actions of a personal nature, having before limited ejectment, but it no where limits or says one word about actions of covenant, neither when the covenant is for work, or acts to be done, nor where the covenant is for the payment of money. Hence, it is insisted, by the counsel, that the action of covenant, not being named in the words of the act, is not within its equity. Castleman's counsel insists there can be no reason assigned, why the legislature would

wish to leave unlimited actions of covenant, especially when actions of debt on like instruments are limited. To this argument it may well be said, that there is no very satisfactory features in the form or substance of the act, to induce a court to believe that the legislature did intend to embrace in it, covenant; but, on the contrary, they use words to evince a contrary intent. It is an established rule, that all acts, made in *pari materia*, are to be taken together as if they were one law. Bac. Ab. 382. It is also laid down in page 381, that the general enacting words, in one clause of a statute, may be restrained by the particular words in a subsequent clause of the same statute; and then again, in the same page it is said, that if the particular thing be given, or limited, in the preceding part of a statute, this shall not be taken away or altered by any subsequent general words of the same statute. In this case, the 2nd and 4th art. are not only found in the same statute, but they are on the same subject, which is to fix the time for bringing actions on sealed instruments. The second sect. of the 4th art. declares that every sealed instrument of writing for the payment of money, shall be presumed to be paid and satisfied after the expiration of twenty years from the time such action shall accrue. But this presumption may be repelled, &c. In the first place, why the legislature should limit the action of debt on a bond to ten years, and then still allow the party to sue after the ten years and within the twenty is not easily seen; and how it can be supposed, that under the name debt, the legislature intended to limit all actions, by whatever name they might be called, and still allow twenty years for the action on a sealed instrument, is not easily seen; accordingly, in the 2nd sect. of the 4th art. it is enacted, that every sealed instrument of writing, for the payment of money, shall be presumed to be paid and satisfied after the expiration of twenty years; this shows, clearly enough, that the legislature did not expect that the enactment in the first part of the statute had barred all sorts of actions on sealed writings for the payment of money in ten years, otherwise they would hardly have attempted, by future repugnant provisions, to fix the presumption of pay-

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ment on like papers at twenty years. From this view of the subject, I conclude, the counsel for Pennington is right in his interpretation of the law. It is argued that the word debt used in the 1st sect. of the 2nd art. is to be understood in its technical sense, as used by the statute. It is a rule, that when legal, or technical words are used in a statute, in that same sense they are to be understood. So here the act bars the action of debt founded on a sealed writing, then debt does not mean covenant too, merely because covenant as well as debt, will sometimes lie on the same instrument. I will leave the point as above discussed. The next point is whether the plaintiff could have judgment on this declaration. There are two counts in the declaration; the first of which is not well laid, but the last is without exception.—In page 470 R. C. sect. 4 it is enacted, that where there are several counts in a declaration, and entire damages are given, the verdict shall be good, notwithstanding one or more such counts may be defective. In this case the plaintiff's declaration is good as to the last count, and would, if he had a verdict, entitled him to judgment; much more is it good as it stands now, where the bad count may be stricken out; there is therefore no objection to the declaration. Because the court below overruled the plaintiff's demurrer to the defendant's plea of the statute of limitations, the judgment of that court is reversed, and the cause remanded for a new trial.

BARKER Plff. in error v. POOL Defendant.

It is error in the circuit court to suffer law books to be taken to the jury, and to leave them to construe the law for themselves. It is the duty of the court to deliver the law, governing the cause, to the jury in the form of instructions, and not to leave law books in their possession, to find what is the law.

Error to Monroe County.

Head for Plaintiff in Error.

2 Kent's Com. 560. Mo. Digest sec. 5, 640. 3 Chitty's gen'l prac., page 916, sec. 21.

Abernathy for Deft in Error.

1st. The jury was warranted from the evidence to find the verdict for plaintiff below.

2nd. The court gave no wrong instructions for plaintiff.

3rd. The court refused no proper instructions asked by the defendant.

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4th. The court did right to refuse a new trial: see 2nd Kent Com. 295. 1 Bla. Com. 431. 8th Johnson's Rep. 421. 3d vol. Mo. Rep. 464, Singleton vs Mann. 1 vol. do. 14, McNight and Brady vs. Wills. 4th vol. do. 295, Oldham vs. Henderson, also Hardwich vs. Holmes decided at the Oct. term of this court in 1839, at Palmyra. Digest of 35, page 350, sec. 6. Do. page 351, Sec. 9. do page 354, sec. 8. do. 350 sec. 2, Spencer vs Medder, 3rd semi-annual part for 1838, page.

Opinion of the Court delivered by Tompkins Judge.

Pool brought his suit against Barker before a justice of the peace, judgment was there given for the plaintiff. The defendant appealed to the circuit court, and in that court judgment was again given for the plaintiff; to reverse which Barker brings the cause here on a writ of error. The evidence, appearing on the record, shows that the action was brought to recover damages sustained by Pool, the plaintiff, by reason of the negligence of the servant of Barker. It was proved, that sometime in February last, a negro slave of Barker was ordered by him to burn a stubble field, and that in burning the stubble field he accidentally suffered the fire to be communicated to a stack yard, in which were a wheat fan, and three gums filled with flax seed, all belonging to the plaintiff Pool. The stack yard was adjoining to the stubble field, and a part of the same tract of land; it was also proved, that Barker had bought this land from Pool, and that he was to have possession on the first of March.— Pool, it also appeared, had removed from this tract of land before the burning of the fan, &c., and Barker was in possession peaceably it seems, although the first of March had not then arrived. The circuit court was requested by the defendant to instruct the jury: 1st. That the defendant was answerable only in case of gross neglect, in case they should find that he was in the legal possession of the farm on which the property was burned. 2nd. That he was liable only for gross neglect. 3rd. That he was not liable if

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he took the same care of the destroyed property that he did of his own. 4th. That he was not liable if the stubble field was found to be his own land, and that he set fire to it without intending to do any injury to the plaintiff. The court gave the first and second instructions and refused to give the third and fourth. The court then instructed the jury: 1st. That if they believed that Barker's servant by his order had set fire to the stubble field, and that through the negligence of the servant Pool sustained any injury Barker was answerable. 2nd. That Barker was liable if it should be found that his servant had through negligence permitted the fire to be communicated to the stack yard. The defendant excepted to the refusal of the court to give the instructions asked by himself and to the giving of those asked by the plaintiff. The defendant moved for a new trial; because, 1st. The verdict was against evidence. 2nd. It was against law. 3rd. Because the court rejected the instruction prayed by him and gave those asked by the plaintiff. 4th. Because the court permitted the jury to carry law books to their room and construe it for themselves.

The character of Barker's possession is not very well ascertained by the evidence in the case. One witness stated that Pool had sold Barker the premises, and contracted to give possession on the first of March, yet, in February, Barker appears to have been in peaceable possession. The jury should have been told that if they believed him to be in possession, by and with the consent of Pool, then he was bound only to use such diligence as a prudent man used about his own affairs; and would be answerable only for gross negligence. But if they had found him in possession without the consent of Pool, a different and much higher degree of diligence would be required. The probability, however, is that he was there by the consent of Pool, as nothing to the contrary appears in evidence. The circuit court committed error in suffering law books to be taken to the jury, and to leave them to construe the law for themselves. It is clearly the duty of the court to deliver the law governing the cause to the jury in the form of instructions, and not to leave books in their possession to find what the

It is error in the circuit court to suffer law books to be taken to the jury, and to leave them to construe the law for themselves. It is the duty of the court

law is. One of the reasons assigned for reversing the judgment of the circuit court, was that that court had not, on the motion of the defendant Barker, dismissed the cause; because, as he says, the plaintiff when he commenced his suit before the justice did not file a bill of items of his account with the justice, in conformity with the provisions of 9th section of the 2nd article of the act to establish justices court &c. p. 351, of the digest of 1835. On an inspection of the justices transcript a bill of the items is found, and as the justice is required to send up the original papers we must suppose that this is a copy of the bill filed. The justice may have made this statement in compliance with the 8th sect. of the 3rd art. of the same act see page 354. At most, the neglect of the plaintiff, to file such a bill of items, could entitle the defendant to nothing more than a continuance of his cause, on account of surprise. The circuit court then, it seems to me, committed no error in refusing to dismiss the cause for this reason, but because that court permitted the law books to be sent to the jury its judgment is reversed and the cause remanded.

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to deliver the law, governing the cause, to the jury in the form of instructions, and not to leave law books in their possession, to find what is the law.

THE STATE V. HELM & THORNHILL.

It is a general rule, that indictments on statutes must state all the circumstances which come into the definition of the offence in the statute, so as to bring the defendant precisely within the act; and the general conclusion, "*contrary to the form of the statute*" will not aid a defect in this respect.

J. R. Abernathy for The State,

Relies on the following authorities: Revised Statutes, page 206; also, page 484. Thou shalt not commit adultery, Moses' 7th commandment.

Opinion of the Court delivered by Napton Judge.

The grand jury of Monroe county at the sittings of the circuit court for March 1839, found an indictment against James Helm and Catharine Thornhill, for living together in adultery. The first count charged, that the said Helm and Thornhill at &c., on &c., did live with each other, and each of them did then and there live with the other &c., for a

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long space of time next prior thereto, to wit: for the space of three months had lived with each other in a state of open and notorious adultery, contrary &c. The second count charged, that the said Helm and Thornhill on &c., at &c., did live with each other, and each of them did then and there live with the other and for a long space of time next prior thereto, to wit, &c., had lived with each other, and did, then and there, with force and arms, lewdly, and lasciviously, abide and cohabit with each other, to wit, on &c., at &c.; they, the said James Helm and Katharine Thornhill; being then and there not married the one to the other, to the evil example, &c. On motion of the defendants the indictment was quashed, and the state by writ of error brings the case to this court. This indictment was founded on the 8th sec. of the VIII art. of the act concerning crimes and their punishment; that section provides that, every person who shall live in a state of open and notorious adultery, and every man and woman (one or both of whom are married, and not to each other,) who shall lewdly and lasciviously abide and cohabit with each other, and every person, married, or unmarried, who shall be guilty of open, gross lewdness, or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding six months, or by fine not exceeding three hundred dollars, or by both such fine and imprisonment. There are three classes of offences provided for by this section- The two first clauses apply only to cases where one of the parties is married, and the last clause to persons whether married or single. The second count is designed to apply to the second class of cases, as described in the second clause of the section; but it is defective in this, that there is no averment that either of the parties Helm or Thornhill was married. It is a general rule that indictments on statutes must state all the circumstances which come into the definition of the offence in the act, so as to bring the defendant precisely within it, and the general conclusion of "contrary to the form of the statute." will not aid a defect in this respect, 1 Chitty C. L. p. 282.—

It is a general rule, that indictments on statutes must state all the circumstances which come in to the definition of

This rule has been sanctioned by innumerable adjudged cases, some of which are cited by Chitty. The same rule will prevent the second count from resting on the third clause of the section, for though the offence described in that count may be such an act of open gross lewdness or lascivious behavior, as the third clause was designed to punish, yet the prosecutor should have averred it to be such in the words, or the material words of that clause. The first count describes the offence in the precise words of the statute, and I am unable to see what objection could have prevailed against it, a definition of the word adultery was surely not desirable, as I question whether any circumlocution could make the offence more intelligible to the common understanding of men than the plain and well understood phrase of the statute.—The court being of opinion that the first count is good, the judgment of the circuit court is therefore reversed and the cause remanded.

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AUSTIN & HAINES Plffs in error v BLUE Def't. in error.

To make a note "negotiable," within the meaning of the 6th section of the act concerning bonds and notes, (R. C. 1835, p. 104,) it must contain the words "for value received, negotiable and payable without defalcation." It is not sufficient that it contain the words "for value received, without defalcation."

Error to Marion County.

U. Wright for Plffs in Error.

1st. The instrument sued on is not a negotiable note, under our law, for lack of the words *negotiable and payable*.

2nd. If it be a negotiable instrument, then the defendants could not be made liable in the summary mode of declaring by petition in debt, but only as in the case of a bill of exchange.

3rd. If the note declared on be negotiable, still the defence set up in the 3rd and remaining pleas is *prima facie* valid, and it was the duty of the assignee to reply that he was the innocent holder or purchaser in the fair course of trade. If he wished to avoid the legal effect of the ground set up in the defence. R. Code 1835 p. 105.

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T. L. Anderson for Def't.

1st. The instrument sued on, contain all the requisites of the statute of this state, to place it on a footing with an inland bill of exchange, see 1 vol. sta. Mo. p. 105, sect. 6 and 7 under the head of bonds and notes.

2nd. The pleas are bad: Byles on bills, p. 40, 52, (2. Ed.) Chitty on bills, p 100, h., 100, m. Chitty on bills, 4th American edition p. 90.

Opinion of the Court delivered by Tompkins Judge.

Blue sued Austin and Haines by Petition in debt, on the following note: Oct. 15, 1836. Twenty four months after date, we promise to pay William Muldrow or order seven hundred dollars for value received without defalcation, John W. Austin Sidney P. Haines.

This note was assigned to plaintiff. The defendants plead 1st, nil debit. 2nd, no assignment. 3rd. fraud in obtaining the note, by the assignor. 4th, a special plea of fraud. 5th. Total failure of consideration, and 6th, no consideration. The plaintiff took issue on the first and second pleas, and demurred to the remainder, and the demurrer was sustained by the court. The issues were found for plaintiff and he had judgment. The only question before this court arises on the demurrer. If the note sued on be not a negotiable note, within the meaning of the 6th section of our statute, the demurrer was improperly sustained. In the act concerning bonds and notes, found at page 104, of the digest of 1835, the legislature have defined, what shall, in Missouri, be negotiable paper; in the 6th section of that act, they say, that every promissory note for the payment of money, expressed on the face thereof to be for "value received" negotiable and payable "without defalcation," shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange. It is to be remarked that the words "or order," are not to be found in this section. By the law merchant those words, or others equivalent, are necessary to make promissory notes negotiable.

To make a note "negotiable," within the meaning of the 6th sec. of the act concerning bonds and notes, (R. C. 1833, p 104,) it must contain the words "value received, negotiable and payable without defalcation." It is not sufficient

The words, negotiable and payable without defalcation, inform the holder, notwithstanding the maker may

have paid the payee, as in cases of inland bills of exchange. This note then not being negotiable under our act, the maker has the same defence against the holder which he could have had against the payee. The circuit court then committed error in sustaining the demurrer to the pleas of the defendant, and its judgment is therefore reversed. words "for value received, without defalcation."

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FUGATE & YOUNG Pl'tfs in error v. CARTER Deft in error.

1. After the parties had announced to the court that they were ready for trial, and the jury were being called into court the plaintiffs presented their petition for a change of venue. Held, that the court properly refused, under such circumstances, to award a change of venue. There might be cases, in which the party might show good reasons for not applying sooner, and excuse himself for the delay; but, none such appeared in this case.
2. It is error in the court to give instructions to the jury, that refer to their determination questions of law.

Error to Lincoln county.

Williams and Howell for Pl'ff in error.

1st. That the court refused a change of venue.

2nd. That the court erred in over ruling the exceptions of the defendants to the answer of the plaintiff, to the defendants bill of discovery.

3rd. That the court permitted the plaintiff to read his answer to the defts. bill of discovery, after he had closed his case, and against the consent of the defendants. 1 Rand. 182 and 187.

4th. That the court misinstructed the jury.

5th. That the court refused to set aside the finding of the jury and grant a new trial. See Mo. Laws, page 614 and 15, title venue, sec. 2 and 3. 3 vol. Mo. Dec. 147, Jim vs. State. Wilson's adm'r of Owen vs. Woodruff, 5 vol. Mo. Dec. 40. 2nd Story's equity, 745. Fenton vs. Perkins, 3 vol. Mo. Dec. 23.

Wright for Defendant in Error.

1st. Exceptions to answer bad in point of form, as being too general, except the 4th exception, and all the exceptions in point of fact, are bad.

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2nd. If the answer was read, which is denied, by especial reference to that part of the record, which professes to give *all the evidence which was read* in the cause. R. Code 462 and 463, Fonblanque 705-706-710-711-719. Tuck. Com. p. 431, 432, R. C. 361.

Opinion of the Court delivered by Napton Judge.

Carter sued plaintiffs in error by petition in debt before the circuit court of Monroe county, on a note of five hundred dollars; the note was as follows: \$500. One day after date, we promise to pay to Peter Carter, or order, the just and full sum of five hundred dollars with ten per cent interest from the 25th day of December last until paid. Paris Mo. 2nd March 1839. Reuben Fugate, Wm. Young.

To this defendant plead usury in the consideration; the plea averred that on the 4th December 1836, a corrupt agreement was made between plaintiff and Fugate, for a loan of five hundred dollars to said Fugate, until the 4th of June 1837, at an interest of twenty per cent per annum, and that two notes were executed by said Fugate, in pursuance thereof, for two hundred and fifty dollars each, bearing interest on their face, at the rate of ten per cent per annum and payable six months after date, with James Fugate and Wm. Armstrong as securities. Plea further avers, that when said notes became due, to wit, on the 4th day of June 1837, said Reuben Fugate took up said note, and in lieu thereof executed another note for five hundred dollars, with James Fugate and William Armstrong as securities, payable six months after date, to wit, on 4th December 1837, bearing ten per cent interest on its face, and that the same usurious agreement was continued in relation to this second note to pay an additional ten per cent interest. Plea further avers, that afterwards, on 4th December 1837, said defendant took up the last mentioned note, and executed a new note, payable 25th day of December 1838, bearing ten per cent interest on its face, with James Fugate and A. Snell as securities, and that the usurious agreement was continued in relation to the payment of the additional ten per cent interest. Defendants further aver that this last mentioned note, after it fell due, and on the 2nd day of March 1839, was again ta-

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ken up by defendant and in lieu thereof, he executed a new promissory note for five hundred dollars, bearing ten per cent, from the 25th Dec. 1838 with William Young as security, which last mentioned note is the identical note sued on, and that the same agreement was corruptly made and continued in force for the payment of ten per cent, over and above the ten per cent called for by said note. The plea avers generally, that all the notes were executed for the same consideration and in prosecution of the same corrupt agreement; the plea further avers, that on the 25th December 1858, defendant fully paid all the usurious interest at the rate of 20 per cent per annum, to wit, the sum of \$204,64, as interest and usury, from 4th Dec. 1836 to the 25th Dec. 1839. On this plea issue was taken, and the parties went to trial; verdict and judgment were for the plaintiff for the amount of his note, with interest as appeared on its face.—From the bill of exceptions, it appears, that on the trial, after the parties had announced to the court that they were ready for trial and the jury were being called into court, the defendant presented his petition and motion for a change of venue. The petition made out a case of prejudice in the people of the county against defendant Fugate; the motion was over ruled by the court. It seems also, from the record that previous to the trial, and in vacation, defendants filed their bill for a discovery, setting forth the transaction nearly similar to the facts averred in the plea, the bill was duly answered by plaintiff, but defendants excepted to the sufficiency of said answer. The answer denies the original loan of five hundred dollars, as charged in the bill, but admits the note for five hundred dollars, which was first given, was in lieu of a note of \$250 formerly given by the Fugates, and another note made by James Fugate, which R. Fugate assumed. It admits usury in all or most of the transactions, and denies that there was usurious agreement in relation to this note sued on. The defendants exceptions to the sufficiency of this answer, were over ruled by the court. The defendants declined reading the plaintiffs answer, on the trial, but relied on other testimony: after this testimony was finished the plaintiff then read his own answer in evidence,

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before the jury; this was objected to by the plaintiff in error, and exceptions duly taken. The court, at the instance of plaintiff, instructed the jury as follows: The jury should find the issue on the plea of usury for the plaintiff, unless they believe from the evidence, that there is some contract, promise, or understanding between the plaintiff and the defendants, that more than 10 per cent interest should be paid for the use of the money mentioned in the said note sued on. 2. That it is incumbent on the defendants in this cause to prove every material averment in their plea of usury, before the jury can find the issue for them on that plea. 3. The jury ought to find the issue on the plea of usury, for the plaintiff, unless the defendant proves substantially the contract of usury set out in their plea; and that, although, they may believe from the evidence, that usury has been agreed for, between the parties, if the contracts were different from those set out in the defendants plea, they ought to find the issue on that plea for the plaintiff. 4. If the jury believe from the evidence that the consideration of the note sued on, is \$250 loaned by the plaintiff to Reuben Fugate, on the 4th Dec. 1836, and \$250 dollars borrowed by James Fugate, of the plaintiff, at the same time, and since then assumed by the said Reuben, they ought to find the issues on the said plea of usury for the plaintiff. 5. If the jury find from the evidence that the contract set out in the plea, is in any material part different from the contract proved in evidence, such variance is fatal to the plea, and the jury ought to find the issues for the plaintiff. 6. If the jury find from the evidence, that the original loaning \$250 of the \$500, was loaned to James Fugate and not to Reuben Fugate, that evidence does not support the plea, that the whole sum of \$500 was loaned to Reuben Fugate. 7. Unless the defendants have established by evidence substantially the original contract, as set out in their plea, the jury ought to find the issue on the plea for the plaintiff, although they may believe from the evidence that more than lawful interest has been contracted for subsequent to that. These instructions were objected to and exceptions taken. after verdict defendants moved for a new trial, on the ground of mis-instructions and

because the verdict was against law evidence, which motion was over ruled.

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The case is brought here by writ of error. The first point which presents itself on the record, is the refusal of the court to award a change of venue on the petition of Ruben Fugate. The statute authorises and requires this to be done, on a state of facts specified, when reasonable notice has been given to the opposite party. In this case the motion came too late; a party might create great vexation to his opponent, if, after the case was called and the sheriff was summoning the jury, he could call for a change of venue. I suppose there might be cases, in which the party might show good reasons for not applying sooner and excuse himself for this duty, but no such reasons appear in this record. The defendants asked it as a matter of right, and the court properly refused to award a change of venue.

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After the parties had announced to the court that they were ready for trial, and jury were being called into court, the plaintiffs presented their petition for a change of venue. Held, that the court properly refused, under such circumstances, to award a change of venue.

The 10th sec. of the fourth article of the act concerning practice at law, provides, that "either party to a suit in any court of record shall be entitled to a discovery from the other party, of all matters material to the issue in such court, in all cases when the same party would, by the rules of equity, be entitled to the same discovery in a court of equity, in aid of such suit." The 14th section declares, that "the answer of the party to the interrogations shall be evidence on the trial of the suit, in the same manner and with the like effect, as an answer to a bill in equity for a discovery." To ascertain the circumstances which will entitle a party to a discovery, and the effect of the answer to such a bill, we must then resort to the usage of the chancery court.

There might be cases, in which the parties might show good reasons for not applying sooner, and excuse himself for the delay; but none such appear in this case.

Where a party goes into equity for a discovery only, it is necessary he should aver that he has no witness by whom he could prove the facts sought to be discovered, and though it is not very well settled that the answer of the defendant to such a bill cannot be controverted, the inclination of the courts so far as I can learn, has been decidedly in favor of this principle. It rests on the ground, that when relief is sought in addition to discovery, and the only ground of relief is in the discovery sought, when the discovery fails, the ground of relief fails with it, and the party if he proves his

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case aliunde, to use the language of the books, proves himself out of court, 2, Tuckers com. 435 Fonblanque 706. Such would be the effect of the answer in the equity court, but it is clear, that it must be some what modified when applied to a similar proceeding which is merely ancillary to the proceeding at bar. In such case, I apprehend, the party seeking a discovery in the equity court has it at his option whither he will avail himself of the proceedings of that court in his trial at law or not, and if he elects to read the answer, and bring in this chancery record, he is then bound by the rule heretofore mentioned, and is not at liberty to contradict by other testimony, the answer of his opponent. The conscience of the other party has been appealed to, and upon his answer the case must be tried; but he may still decline reading the bill and answer; he may have discovered witnesses by whom he can make out his case, and the other party has not been prejudiced by his appeal to his conscience, until he makes some use of the response to that appeal. If such be the case, when the bill for the discovery and answer have been obtained in another court, our statute declares that in the proceeding in the same court, the same rules must apply. The defendant Fugate declined reading the answer of Carter, which he had a right to do, and thought proper to rely on other testimony to make out his case. If he had read this answer, in my opinion, the case must have been tried on that alone; but I cannot believe that Carter had any right to read his own answer, which had not been made evidence by the defendant, and was certainly no part of the record. There is an obvious analogy between this provision in relation to bills of discovery in the circuit court, and the provision in the act regulating proceedings, before justices of the peace, by which either party can get the benefit of his adversaries oath: when this benefit is actually obtained, and the party has testified, no other evidence can be adduced; so, where the party complaining in the circuit court, not only files his bill and compels the answer of defendant, *but avails himself of such answer, in the trial*, he cannot, and ought not to resort to other testimony to invalidate such answer; but until he does offer to

read the answer in evidence, it is as though it was a proceeding in another court, and cannot effect the right of either party. Upon general principles then, the party who has been appealed to, and answered, ought not to be allowed to avail himself of his own answer unless the other party first makes it testimony. The court erred in my opinion, in allowing the plaintiff to read his own answer to the jury, after defendant had declined making any use of it, and rested his case on other testimony. 3. The instructions which the court gave in this case are liable to objection. The first instruction is well enough, but all the others are calculated either to embarrass and confuse, or to mislead the jury. The jury are called upon to determine questions of law, and find out what averments are material and what may be unnecessary. For the reasons above given, I am of the opinion the judgment should be reversed and the cause remanded.

TOMPKINS Judge.

I concur in the opinion that the judgment of the circuit court ought to be reversed, because the court gave erroneous instructions to the jury.

M. McGIRK Judge dissenting.

In the above case I do not concur.

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It is error
in the court
to give in-
structions to
the jury,
that refer to
their deter-
mination ques-
tions of law.

CARSON adm'r. of STEPHENS and plf. in error vs. BLAKEY and LOVE, Adm'rs. of ANDERSON and def't. in error.

A deed of mortgage with a power of sale in the mortgagee is valid in this state; and a sale by the mortgagee, if made in pursuance of the provisions of the deed, vests in the purchaser a valid title.

Napton Judge dissenting.

Error to Marion county.

T. L. Anderson for plf. in error.

A deed of mortgage with power to sell, legally enables the mortgagee to sell on failure of the mortgagor to pay the debt secured, and that such sale rests in the purchaser a valid title. 1 Pow. on mort.—18 Vesy 344—2 Cruise 105. sec. 43 and 44. 27 Eng. Com. L. Rep, 268.

U. Wright for def't. in error.

1st. That under our law a mortgage with a power of sale in mortgagee is void.—2nd. That the only method of obtain-

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of Stephens

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Love adm'r.
of Anderson.

ing title to mortgaged premises is, with us, by a sale under a petition for foreclosure.

Opinion of the court delivered by Tompkins Judge.

Carson, as administrator of Stephens, brought his action of ejectment against Anderson in his lifetime; the death of Anderson being suggested on the record, Blakey and Love were made parties as administrators. The judgment of the circuit court was given in favor of the defendants, and to reverse that judgment, Carson prosecutes this writ of error in this court. The evidence in the case is, that in the life time of John Anderson, one George McDaniel became the security of said Anderson for the sum of one thousand dollars, and that Anderson wishing to secure said McDaniel from any loss on that account, executed to him a mortgage for the land here sued for, with a power to McDaniel himself, to sell the premises on certain conditions in the mortgaged deed mentioned. McDaniel sold the land and Joseph Stephens, the plaintiffs intestate, became the purchaser. It is not contended that the conditions prescribed in the mortgage deed have not been complied with. The only contested point, is whether the mortgagor can consistently with law, constitute the mortgagee a trustee for the purpose of selling this land, to raise money to pay the debt due to the mortgagee himself from the mortgagor. On the part of the defendants in error it is contended, 1st. That under our law a mortgage with a power of sale in the mortgagee is void. 2nd. That the only method of obtaining title to the mortgaged premises is, with us, by a sale under a petition for a foreclosure. The act concerning mortgages, of February 18th 1825, found in Digest of 1825, page 593, provides, that in all cases of mortgages of land &c. where the mortgagee, his executors, administrators or assigns, shall file a petition in the office of the clerk of the circuit court of the county where the mortgaged premises lie, against the mortgagor, or his heirs, executors or administrators, &c., setting forth the instrument of writing containing the mortgage, and praying that the equity of redemption may be foreclosed, and the mortgaged premises sold to satisfy the amount then due, the clerk shall issue a summons requiring the defendant

to appear &c., the cause then proceeds, as do other causes in the circuit court, with this exception,—that no sale shall be made within nine months after filing the petition. Thence it is inferred that in every case of a mortgage the mortgagee must proceed by filing his petition in the circuit court to procure a sale of the mortgaged premises; this is, in my opinion, a mistaken view of the legislative will. No restrictions are imposed by law on the power of alienating lands in Missouri. On the contrary, as they are here easily obtained, every facility is afforded to the owner to alienate, in order that they may better serve his purposes, when he thinks he can better his condition by alienating, and our Legislature, have interposed to remove many of the obstacles which the courts of chancery in England, by their own authority, have created, to prevent a forfeiture of the mortgaged premises by a failure of the mortgagor to pay the money due on the mortgage at the appointed day. It is true, as contended in argument, that the law still deprives the borrower of money of the power to bind himself to pay a greater interest than ten per cent per year, and might, perhaps, with equal propriety, restrain the power of alienating lands; but the legislative power has not deemed it expedient to do so, it has simply declared, that when the mortgagee &c., shall file the petition, these proceedings to enable him to collect his money, shall take place, leaving individuals at liberty to settle their own business after their own way, when they choose so to do. For neither the sheriffs, nor the clerks appear to be such favorites with the legislature, that mortgagor and mortgagee should be compelled to go into court in order to contribute to their emoluments, nor does the policy of our constitution and laws render the support of a landed aristocracy so necessary, that courts of law here, should, like the courts of chancery in England, outstrip the legislature in zeal to restrain the alienation of real estate. It not appearing then, that this mortgage deed was improperly obtained by McDaniel, from the deceased, John Anderson, the intestate of the defendants in error, I see no reason why, in a court of law, it should not be held valid.—The regularity of the proceedings under the deed of mort-

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of Anderson.

A deed of mortgage with a power of sale in the mortgage, is valid in this state; and a sale by the mortgagee, if made in pursuance of the provisions of the deed, vests in the purchaser a valid title.

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of Anderson.

Napton judge
dissenting.

gage have not been questioned. The judgment of the circuit court ought then, in my opinion, to be reversed, the President of the court concurring in that opinion the judgment is reversed, and the cause remanded for further proceeding.

Dissenting opinion of Napton Judge.

I am not satisfied, that in this state, a person should be allowed to unite in himself the character of mortgagee and trustee with powers of sale; the practice has obtained in England, but has grown up in comparatively modern times. The same practice has been sanctioned by legislative provision in New York, but has been repudiated in Virginia for reasons, which appear to me entitled to great weight.—Deeds of trust have so commonly obtained, in this country, as to enable the creditor, who is desirous of avoiding the delays of procuring a foreclosure, to attain all the ends of a security without a resort to court. But in those deeds the creditor cannot unite in himself the inconsistent character of trustee. I incline, therefore, to the opinion that the judgment be affirmed.

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MULDROW Plaintiff in error v. TAPPAN and others Defts
in error.

A declaration in assumpsit must aver a promise on the part of defendant, and unless the liability of def't is shown, by proper averments, the defect is not cured by verdict.

Error to Marion county.

Wright and Wells for Plaintiff in Error.

1st. The declaration nowhere avers that there was an undertaking or promise, either express or implied, by the defendant to the plaintiff; the declaration was, therefore, bad, and the judgment should have been arrested: see 1 Chitty 329 and note. 2 Call 39. 3 Mum. 566. 2 Wash. 187. 2 Tucker 145.

2nd. The evidence showed a total failure of consideration; the verdict should, therefore, have been for the defendant; the verdict being wrong there should have been a new trial granted.

Campbell and Glover for Defendants in error. JUNE TERM
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1st. The promise is sufficiently charged in plaintiffs declaration. See Laws on pleading in assumpsit, 30-1. Muldraw
 1b 331. Chitty's pl. v. 1, p. 154, title bonds vs
 and notes, sec. 1. 4 Mo. Dec. 33. Tappan et al.

2nd. The averment of performance, or readiness to perform, was not necessary, because the plaintiffs were not by the terms of the contract to do any thing till the payment of the money. Tucker Com. 2 vol. 145. Chitty Pl. v. 1, 358-9.

3rd. If any deficiency existed in the declaration it was cured by the verdict. 7 Johns rep. 111. 1 Wilson's R. 100. Chitty's Pl. vol. 1 p. 422-3. 2 Jacob's Law Dic. p. 54. 2 Tucker's Com. 146. Rev. Code Mo. 468. 4 Mo. Dec. 483. 1b. vol. 5 87.

4th. The verdict is according to the evidence in the case.

Opinion of the Court delivered by M^cGirk Judge.

Arthur Tappan and others brought an action of assumpsit on a promissory note for one thousand dollars against William Muldraw. The defendant pleaded non assumpsit, and on this issue the parties went to trial; the plaintiff gave his note in evidence, and, thereon, the defendant had judgment against him for the thousand dollars and interest.— He then moved for a new trial which was refused. He then moved in arrest of judgment for defect in the declaration, which the court over ruled. The defendant brought his cause here by writ of error, and assigns for error the defect in the declaration. The declaration begins by declaring that Arthur Tappan and others complain of William Muldraw of a plea of trespass on the case on promises, for that whereas heretofore, to wit, on the 13th of May, 1835, at the county of Marion, in the State of Missouri, the said defendant did, by his certain writing which he signed and executed by the name of Will. Muldraw, contract and agree to and with the plaintiff in the words and figures following, to wit: Then follows a copy of the note or writing sued on. It is no where averred that the defendant promised any particular thing, but the note is set out without any averments
 ining a promise. In 1st Chitty's pl. 329 and

A declaration in assumpsit must

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aver a prom-
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dant, and un-
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ity of def't is
shown, by
proper aver
ments, the
defect is not
cured by ver-
dict.

note 2, it is laid down, that the declaration must aver, or assert a promise on its face, or it must contain words equiv-
alent to a promise. There is a case where the plaintiff
shewed the defendants liability on a bill of exchange as
drawn, but omitted to say that he promised, 1st Chinty ph
330. This was, after verdict, holden good, see note 1, in
the last page; but in this case, the plaintiff shows no liabili-
ty. The regular mode to declare is to aver that the defen-
dant made his note or bond; by which he promised to pay
the plaintiff so much money. at such a time. For this de-
fect the judgment ought to have been arrested. The judg-
ment is reversed with costs, and remanded for a new trial
with leave to amend on payment of costs of amendment.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

THIRD JUDICIAL DISTRICT,

MAY TERM 1840.

NEWMAN V. LAWLESS.

1. In a declaration in ejectment, the description of the premises contended for, must be such as to enable the jury to identify them, with the description contained in the deeds upon which the plaintiff founds his claim; and other evidence is inadmissible to identify the premises described in the declaration, with those described in the deed.
2. It is error in the circuit court to give instructions to the jury that involve questions of law; therefore, where, as in this case, the court instructed the jury, that they were to disregard all evidence to explain any ambiguity *patent* or *latent*, on the face of the deed, the Supreme court held such instruction to be erroneous, as it was the province of the court, and not of the jury, to decide whether the ambiguity was *patent* or *latent*. The party should have called the attention of the court to what he conceived to be the ambiguity *patent* or *latent*, and required the court to instruct the jury, that such ambiguity could not be explained by any evidence dehors the deed.
3. Plaintiff claimed under one M. who, it was proved, prior to 20th Dec. 1803, had enclosed and cultivated the land in controversy; and, in support of his claim, relied upon the acts of Congress of 13 June, 1812, "making further provision for settling the claims to land in the territory of Missouri": also the acts of April 12, 1814, and April 24, 1816, granting pre-emption rights in certain cases. The defendant claimed under a confirmation, by the recorder of land titles, to the widow of said M. Held: that as the plaintiff had failed to prove that the land, in controversy, was either a town or village lot, out

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lot, common field lot, or commons, within the provisions of the act of June 13, 1812, and had shown no compliance with the said pre-emption acts, nor any grant from either the Spanish or French governments, or confirmation by a board of commissioners, he could not prevail against the defendant, whose confirmation concluded all persons not able to show a complete Spanish or French grant, or a prior confirmation by a board of commissioners, or bring themselves within the provisions of said acts of Congress.

4. The judgment of the circuit court will not be reversed, on account of erroneous instructions given, where the party complaining has shown no right of action.

Error to the Circuit Court of St. Charles county.

Bird for Plaintiff in Error.

1. That according to the evidence and the law of the case as preserved on the record, the jury should have found for the plaintiff, and probably would have done so if the case had been left to them without any erroneous instruction of the court.

2. That south east quarter of block 109 was property separated from the King's domain during the Spanish government and vested in J. B. Marly deceased, and did not pass to U. S. by treaty between her and France but remained in said Marly secured not only by said treaty, but by the law of nations. 4 Peters 512. 9th do 734. 10th do 330-335-726-732-736. 6th do 712. 7th do 86-87. 8th do 444-465. 9th do 133-734-747-748-749. 10th do 305-330-721-732. 6th do 709-714. 8 Peters 450. 9th do 138-144-737. 10th do 105-324-331-35-36-718-736.—12th do from 434 to 441.

3. That by the act of 13 June 1812 this lot was confirmed to said Marly's children by a legislative grant which vested a complete title in them, which could not be divested or in any way defeated by Recorder Bates, by any subsequent act of Congress, or by the issuing of the patent read in evidence. See 1 Mo. Rep. Vassier vs. Benton—Salle vs. Primm, 3 do 534. Newman vs Lawless, second S. A. part 5th do 236. 12 Peters 453-454-455. 2d S. A. part of 5 Mo. Rep. 346. 9 Cranch 87-299. 7 Wheaton 380. Doe vs. *Unum* et al.

4. That the deeds read in evidence by plff. are good and

sufficient to pass to him such title in said town lot as was vested in the grantors at the date of said deeds. 3 Cruise digest title deed, sections 1, 2, 36, 37, 44, chap. 1. 3 Cruise chap. 23, title 32, from sec. 1 page 415 to sec. 28 page 425. See also section 38. General description in deed or mortgage good to pass grantors estate, 11 J. R. 365. 13th do 537-551, not so in sheriffs deed. 13 J. R. 97, 537. 18 J. R. 60. 17 do 146. 18 do 81. 19 J. R. 449. 18 J. R. 107.

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5. That said lot is a town lot or an out lot, within the meaning of the act of the 13th June 1812, see said act.

6. That the court erred in instructing the jury.

7. That the court erred in over ruling plaintiffs motion for a new trial.

B. Allen for Plaintiff in error.

1. That the whole case, considered with reference both to the evidence and the law—wherein I include the correctness of the instructions given by the court below—is now open to review; and if it shall be found that there was any error in the instructions of the court, which materially affected the verdict, or that the verdict was against the weight of evidence, or the law of the case, the judgment should be reversed, Graham on new trials p. 261 to end of sec. 2 Cains Rept 90. 10 Johns Rep. 450-1.

2. That the first instruction given on behalf of deft is erroneous, inasmuch as it excludes from the consideration of the jury all parol and documentary evidence of identification of the lot described in declaration, with the lot described in the deeds mentioned in that instruction.

3. That the second instruction given on behalf of deft is erroneous, inasmuch as it excludes from the consideration of the jury, all the evidence having for its object the location of the lot described in those deeds. 5 Wheat. Rep. 359.

4. That the third instruction given on behalf of deft is erroneous, inasmuch, as it contemplates that the parcel of ground occupied by Marle prior to 20 Dec. 1803, should have been called and known as a town, or out lot, under the Spanish Government.

5. That the fifth instruction given on behalf of deft, is erroneous, inasmuch, as it assumes that the possession by

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Marle, under whom pl'tff claims, must have been under the authority of the French or Spanish Gov't.

6. That the twelfth instruction given on behalf of deft. is erroneous, inasmuch, as it assumes that the act of Congress can only operate in favor of Baptiste Marle, and not in favor of his representatives.

7. That the thirteenth instruction given on behalf of deft is erroneous, inasmuch, as it leaves the jury in uncertainty and ignorance of what is meant by a settlement, but if by settlement a possession prior to 20th Dec. 1803, is comprehended, then the instruction has withdrawn from the jury the consideration of the facts, which it was peculiarly their province to determine, and the court has adjudged the whole case law and evidence in exclusion of the jury. 2 vol. of public land laws 64-72-1014.

8. That the deft is estopped to deny that the parcel of ground possessed by Marle prior to 20 Dec. 1803, was a lot. Comyns Dig. title estoppel 200, 3 sec. 20—deed from F. Marle to Riddick.

9. That the United States government has recognized same as a lot, and no third party is at liberty to gain by the same, or deny that it is such. for the purpose of this suit.

Passing by these points, we come to the following as most material, involving the fate of the case.

1. Was there such possession of the lot sued for, or any part thereof, on which the act of 13 June, 1812, could operate, as to vest a right to same in Baptiste Marle or his legal representatives? This it is affirmed there was. See evidence, act of 1812—Vassier vs. Denton, 1 Mo. Rep. 296. Lajoie vs. Primm, 3 Mo. Rep. 534. Adm'r Janis vs. Guerno, 4 Mo. Rep. 459, bottom of page. Act of Congress of 26 May 1824, same law 884.

2. Was this right vested in the present pl'tf by the conveyance read in evidence? In support of the affirmative of this question, the pl'tf in error refers to the parcel evidence given, and the deeds offered and read by him in evidence and to the act of Congress of 13 June 1812. 3 Crane's Dig. p. 41, sec. 37-38, and p. 43 sec 43. 7 Peterdorf 453. 7 Johns Rep. 222. 11 Johns Rep. 365. 13 J. R. 537. 18 J. R. 59-

81-107. 19 J. R. 448. 5 Wheat. Rep. 359. 4 Com. Dig. MAY TERM
235. 3 Starkie's ev. 1000, 1021 and 1695. 1840.

3. Was there any out-standing title to defeat the right of the plaintiff? The plaintiff in error affirms there was not, and relies on the following authorities: 9 Cranch 87-292. Strother vs. Lucas, 12 Peters Rep. 410-453, &c. Morton vs. Blankenship & Ridg, vol. 5, Mc. Rep. 2d series and part 346. Lawless vs. Newman, ib page 236. See act of 1816, ambiguity what.

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VS.
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L. E. Lawless for Defendant in error.

1. That the deeds of conveyance offered in evidence by plaintiff are void for patent ambiguity and uncertainty on the face of them. 4th Comyns Digest, title "Fait" (Days Am. ed.) p's 270-284-285, and title "Grant", p. 535. 4th Cruise Digest, title "Deeds" p. 225 269, 277. Missouri Rep. vol. 1, p. 553, Perry vs. Price. 7 Johns Rep. p. 217.— 13 Johns Rep. p. 97. Missouri "act regulating conveyances," Revised Stat. p. 118. "Act to regulate Eject." Revised Stat. p. 233. "Act concerning contracts and promises," Revised Stat. p. 117.

2. That the plaintiff failed in establishing the title of John Baptiste Marly to any part of the land described in the declaration, and, more particularly, to the 120 by 150 feet surveyed for Felicite Marly and her legal representatives, because, 1st. No lot was proved to have existed, (but the contrary) on any part of the premises in the declaration mentioned prior to the 20th Dec. 1803, or prior to the special grant by the U. States of said 120 by 150 feet to Felicite Marly. See the evidence spread on the transcript: see act of Congress 13th June, 1812, and the act supplementary thereto May 26, 1824. 2. No grant by the French or Spanish Government, or permission to occupy as owner, to J. B. Marly was shewn by plaintiff: see evidence aforesaid.

3. No claim was ever made by said J. B. Marly or his heirs of any part of the land in the declaration mentioned of any government, French, Spanish or American. See evidence as aforesaid. 4. The grantors of plaintiff had notice of the conveyance by Felicite Marly in 1814, and of the claim on her behalf, and the grant to her by the U. States, and never

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dissented from same or put in a claim thereto under any act of Congress. 5. The patent given in evidence by the defendant, together with the chain of title under Felicite Marly, shows a legal estate out of Jno. B. Marly, and his heirs and assigns. The court is here referred to the case of Wilcox vs. lessee of McConell, and to the case of Bagnell vs. Brodwick, both decided at the last session of the S. Court of the U. States.

*Opinion of the Court delivered by Tompkins Judge.**

Newman brought an action of ejectment in the circuit court of St. Louis county against Lawless, who being the judge of that court, the cause was transferred to the circuit court of St. Charles county, judgment was there given against Newman, and to reverse it, he prosecutes his writ of error in this court.

The land sued for, is the spot where Lawless' house stands in the city of St. Louis, a part of block 109: and if the fractional township, within which this land lies, were subdivided into sections, according to the manner in which the lands of the United States are surveyed it would fall within the south east quarter of section No. 23, of township No. forty-five north of Range No. seven, east of the 5th principal meridian.

Newman derived his title to this land or lot from John Baptiste Marly, a part of whose legal representatives were Newman's vendors; and it lies west of fourth street, which separates it from the lot of Louis Delille. It was proved that Marly, who died in 1806, had before the year 1800, built a barn on it and also inclosed and cultivated it. Marly retained possession till his death, residing all the time on second street in St. Louis. Some years after his death, his widow laid in a claim for this lot, before the recorder of land titles for the territory of Missouri. At that time, the Recorder had succeeded to all the powers and duties conferred and imposed on the board of commissioners, appointed in pursuance of the act of Congress of the 2nd of March 1805, for the purpose of ascertaining the titles of persons claiming

*McGirk Judge not sitting.

lands in the territory, under any French or Spanish grant. The application is in these words, viz: "Widow Marly to Frederick Bates, Recorder of land titles within and for the Territory of Missouri. Sir: please to take notice, that I claim a lot in St. Louis, of 120 by one hundred and fifty feet, back of Louis Delille, as a barn lot, the same having been owned by my husband, from a number of years to the present day." Signed, "Felicite Veuve Marly."

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The claim was confirmed, and the patent issued to Felicite Marly in her own name. No evidence was given that this lot was ever surveyed in the life time of John B. Marly. Two deeds, made by several representatives of the deceased Marly were given in evidence. The first of which is as follows: "Whereas we claim a piece, or tract of land, as the heirs of Baptiste Marly, and his wife, deceased, situate in the south part of the town of St. Louis, by virtue of an actual settlement made on said land by our ancestors, according to the provisions of two acts of Congress; the one passed the 13th of June 1812, defining the rights, titles, or claims to town or village lots, out lots &c.; the other, passed the 12 of April 1814, granting the right of pre-emption to any person, or the legal representatives of any person, who had actually settled on any of the public lands in the now State of Missouri, and inhabited and cultivated the same, according to the provisions of an act of Congress passed the 5th of February 1813, entitled an act giving the right of pre-emption in the purchase of lands situate in Illinois territory; and also according to the provisions of an act of Congress passed the 24th of April 1816, granting the right of pre-emption to certain settlers on the public lands, according to the provisions of that, and preceding acts; which land, so claimed by us, is claimed by virtue of a settlement made by our ancestors, on or near block 109 and 78, as numbered on the map of the city of St. Louis, supposed to be on the south east quarter of section No. twenty three, of town No. forty-five, north of Range No. 7, east of the fifth principal meridian." Then follow the granting words. The second reads thus: "We, &c., do hereby for and in consideration of &c., give, grant, &c., unto Jonas

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"Newman, all the right, claim and interest which we have or can have, by virtue of a settlement made by our ancestors John Baptiste Marly and wife, deceased, on or near blocks 109 and 78, in the city of St. Louis; which land we claim by virtue of divers acts of Congress, and the settlement so made as afore-said; and is supposed to be situated in township forty-five north, range 7 east, and on the south-east quarter of section 238."

Lawless the defendant below, and also here, claims by title derived from Felicite Marly, widow of John Baptiste Marly, deceased. The patent recite, that whereas Felicite Marly, widow of John Baptiste Marly, has deposited in the general land office, a certificate number one thousand one hundred and fifty, of the Recorder of land titles at St. Louis Missouri, whereby it appears, that in pursuance of the several acts of Congress for the adjustment, of title and claims to lands, the said Felicite Marly, widow of Baptiste Marly, has been confirmed in her claim to a lot of land in St. Louis Missouri, containing one hundred and twenty feet in front by one hundred and fifty feet in depth, French measure, &c. there is therefore granted to the said Felicite Marly, widow &c. and her heir, the lot of land above described. Felicite Marly sold to Thomas F. Riddick, and he to Alexander Stewart, and the heir of Alexander Stewart to Thomas Biddle, in trust for Virginia Lawless, wife of the defendant. This chain of title is here noticed because the defendant contended that the action should have been brought against his wife, the title being joint. When this cause was first before this court, the same point was made by Lawless, then plaintiff in error. It was then disposed of, all the judges being present and concurring: and I believe, that as much was then said on the subject as any one of the judges thought it deserved. I have heard nothing in this last argument to change my opinion, and if I had, I would not now presume to disturb a decision made by a full court; this argument being addressed to a court composed of two only of the judges. See the point decided page 241, of the 5th volume of Missouri decisions. On the motion of Lawless the defendant in error, the court gave these instructions to wit:

1st. If in the deeds given in evidence by the plaintiff from the heirs of Baptiste Marly to the plaintiff, the jury, on inspecting the same, shall not find therein a description of the premises in the declaration mentioned and described, they ought to find for the defendant.

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2d. If the jury shall be of opinion, that in the above deed from the heirs of Baptiste Marly to the plaintiff, the premises in the declaration mentioned, are not described, they ought to disregard all parol, or other evidence, to explain any doubt or ambiguity, apparent or patent, on the face of those deeds respecting the premises conveyed or intended to be conveyed.

3d. If the jury shall be of opinion that it has not been satisfactorily proved by the plaintiff, that previous to the 20th of December 1803, a town lot, out lot, or common field lot existed, on, or within the premises in the declaration mentioned, they shall find for the defendant.

5th. If the jury shall be of opinion that Baptiste Marly did not, previous to the 20th of December 1803, occupy, by himself or tenant, and possess the premises in the declaration mentioned and described, by and under the French or Spanish government, as a town lot, out lot, or common field lot, they shall find for the defendant.

12th. If the jury shall be of opinion, that it has not been satisfactorily proved by the plaintiff, that Baptiste Marly claimed the premises, in the declaration mentioned, from the French or Spanish Government, or from the American Government, they shall find for the defendant.

13th. That no evidence whatever has been offered, or given, to establish a title in Baptiste Marly to the premises in the declaration mentioned, under any pre-emption law, or law of the United States, granting land by virtue of settlement thereon.

The plaintiff moved for a new trial because the jury found contrary to evidence; against the weight of evidence; against the law; and against the instructions of the court. This motion was overruled.

The errors assigned are general, and that the court misinstructed the jury; and the first and most material inquiry

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will be, did the plaintiff give any evidence, which would entitle John Baptiste Marly, or his legal representatives, to recover in this action?

By the first section of the act of Congress of the 13th of June 1812, it is provided, that the rights, titles, and claims, to town or village lots, out lots, common field lots, and commons, in, adjoining, and belonging to, the several towns or villages of Portage Des Sioux, St. Charles, St. Louis, and others in the territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the 20th of December 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights thereto.

By the third section of the same act, it is provided, that every claim to a donation of land in the said territory, in virtue of settlement and cultivation, which is embraced by the report of the commissioners transmitted to the Secretary of the Treasury, and which shall, by the said report, appear not to have been confirmed, merely because permission, by the proper Spanish officer, to settle, has not been duly proven; or because the tract claimed, although inhabited, was not cultivated on the 20th of December, 1803, or not to have been confirmed on account of both of these causes; the same shall be confirmed, in case it shall appear that the tract so claimed was inhabited by the claimant, or some one for his use, prior to the 20th of December, 1803, as aforesaid &c. By the act of 18th of April 1814, still greater indulgence was given to those claiming lands, not embraced within the description of village or town lots, out lots, or common fields; and the second section of that act, provides that every person claiming lands within the said territory, by right of donation under any former laws, whose claims are contained in the report of any of the Boards of Commissioners, made, or hereafter to be made, under existing laws, and which claims shall appear by the said report not to have been confirmed, merely because the tracts claimed were not inhabited on the 20th day of December, 1803, every such person shall be, and the same hereby is confirmed, in his claim or claims, and by the fifth section of the same

act, it is further provided, that "every person, and the legal representative of every person, who has actually inhabited and cultivated a tract of land lying in the territory of Missouri, which tract is not rightfully claimed by any other person, and who shall not have removed from the said territory, shall be entitled to a right of pre-emption in the purchase thereof, under the same restrictions, conditions, provisions and regulations, in every respect, as are directed in the act giving the right of pre-emption in the purchase of lands, to certain settlers in Illinois territory, passed 5th February, in the year 1813.

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The second section of this last mentioned act of the 5th of February, 1813, requires every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, to make known his claim to the Register of the land office of the district in which the land may lie, by delivering a notice in writing wherein he shall particularly designate the quarter section which he claims, and in every case where it shall appear to the satisfaction of the Register and Receiver of the land office, that any person who has delivered this notice of claim is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled, shall have a right to enter the same with the Register of the land office on producing his receipt from the receiver of public monies, &c. provided, that all the lands to be sold under this act, shall be entered with the Register, at least two weeks before the time of the commencement of the public sales.

The public sales of land in the district, where the contested land lies, took place nearly twenty years before the trial of this cause in the circuit court, and not one word of evidence appears on the record, to show even a notice to the Register, of the claim either of John Baptiste Marly, or of his legal representatives, much less of the allowance of that claim by the register and receiver, and the payment of the price of the land, without which last act, the two first would have been of no avail. The act of the 24th of April 1816, gives no relief to negligence of this kind, for it makes no change in the act of 1813, as to the necessity of notice to

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the register and receiver, and lastly of the payment of the price of the land.—No longer embarrassed then with the claim of the plaintiff under the pre-emption laws, I will proceed to the consideration of the other laws by virtue of which he claims as vendee of the heirs of John Baptiste Marly.

Before proceeding to the examination of the other laws relied on, it may be well to premise that by the 8th section of the act of 13th of June 1812, the recorder succeeded to the powers and duties of the board of commissioner, and that by the fifth section of the act of the 2d March 1805, this board or a majority of them, had power to hear and decide, in a summary manner, all matters respecting such claims, also to administer oaths and compel the attendance of witnesses, and examine them, and such other testimony as might be adduced; to demand and obtain from the proper officers all public records, in which grants of lands, warrants or order of survey, or any other evidence of claims to land derived either from the French or Spanish governments, may have been recorded; to take transcripts of such records, or any part thereof; to have access to all other records of a public nature relative to the granting, sale, transfer, or titles of lands within his district, and decide according to justice and equity on all claims filed.

The evidence that Newman gives of the title of his vendors is this, that Felicite Marly filed a claim for this land in her own right, and that the Recorder acting under the authority of the law just above recited, decided that it was her property, and it is contended, that she being the widow of John B. Marly, this adjudication of the recorder inures to the benefit of the heirs of the deceased J. B. Marly. The case of Strother vs. Lucas has been twice before the Supreme Court of the United States, and each time it has been decided that the confirmation (that is to say, the adjudication of the board of Commissioners) inures to the benefit of the confirmee, and not to that of any grantee of the French or Spanish Government, from whom such confirmee might have derived title, whether mediately or immediately. See 6 Peters, p. 772, and 12 Peters 458.

In the first case, or rather the first time this case was before the Supreme Court, the district court had instructed the jury, that if they found from the evidence, that the two confirmations to Auguste Chouteau, given in evidence by the plaintiff in this case, are for the same land, and include all the premises in the declaration mentioned, the plaintiff cannot recover in this action. Chouteau was not the grantee of the Spanish Government, but claimed the land as vendee, in perhaps the fourth or fifth degree from the grantee of the crown of Spain.

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The Supreme Court decided that the instruction was correctly given. The decision of that court, on the construction of an act of Congress, is obligatory on this; and if the law of the land did not make it so, the reason and justice of the case would. More than fifteen years before this case was first in the Supreme Court of the United States, the superior court of the Territory had made the same decision on the construction of the acts of Congress for ascertaining and adjusting land claims in the territory of Missouri. The decision of this last mentioned court, though not obligatory on this, is of not less authority than the former. The judges of the territorial court decided at a time when, and in a country where, almost every individual member of the community was deeply interested in understanding the force and effect of these acts of Congress. It became the duty of Congress, immediately on the cession of the territory by France, to provide for speedily ascertaining and adjusting all private claims to lands in the ceded territory; and it was equally the interest of the United States that these claims should be ascertained and adjusted, in order that the lands belonging to the public might be brought into market for the benefit of the Treasury. For the purpose of ascertaining and adjusting these private claims, a board of commissioners had been appointed as early as 1805, and by the fourth section of the act of 2nd March, of that year, it was provided, that all persons claiming lands by virtue of any legal French or Spanish grant, made and completed before the first day of October, 1800, might, and those claiming by virtue of the two first sections of that act, or by virtue of any

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grant or incomplete title bearing date subsequent to the 1st of October 1800, were required to deliver to the recorder of land titles, a notice, in writing, stating the nature and extent of their claims, together with a plat of the tract or tracts claimed; and the consequence of neglecting to deliver such notice, &c., was a forfeiture of all the advantages offered to such claimants by the provisions of that act. By this act claimants were allowed till the 1st day of March, 1806, to file their claims.

Several acts were subsequently passed extending the time for filing their claims, and granting other indulgences. But such was the sullen indifference of the claimants, that, when Congress determined no longer to defray the expense of maintaining a board of commissioners, much remained to be done towards ascertaining the claims which the Congress itself thought ought to be confirmed. Therefore the act of 13th of June 1812, was passed, at the suggestion, probably, of some, or all of the commissioners of the board.—For the dates show that Missouri then had no delegate in Congress. The terms used in confirming tracts of land, in the acts of Congress of 13th June 1812, and of the 12 of April, 1814, are equally as strong as those used in the act of 1812, confirming town or village lots, out lots, and common field lots, and commons. There is found this only difference, that the town or village lots, out lots, common field lots, and commons, being in legal contemplation, as well as in reality, already ascertained by survey, they were confirmed to the inhabitants of the respective towns or village, enumerated in the act, according to their several rights in common thereto, and whether they filed a claim or not, no forfeiture took place; whereas those who had a claim to a tract of land which was neither town nor village lot, out lot, common field lot, nor commons, in, adjoining, and belonging to, the several towns or villages enumerated in the act, were required to file their claims by a given day, otherwise such claimants forfeited all the advantages accruing from these acts of Congress. The act of 13th June 1812, presumes that in the enumerated villages, there will be property not rightfully appropriated or claimed, and all such is

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reserved for the support of schools, with the exception of such as the President of the United States might think proper to reserve for military purposes. The policy of the law then as much required the claimants of town or village lots, out lots, and common field lots, to come in and establish, before the recorder, their several claims, as it required those who claimed by any incomplete French or Spanish grant, or as a donation, by virtue of settlement or cultivation.— But the law had neglected to annex the penalty of forfeiture of all the benefits of the act, to the neglect of this duty.— The claimant then who went forward before the recorder and proved his right under the act of 1812, to a town or village lot, out lot, or common field lot, had a good title against all persons who could not produce a complete French or Spanish grant, or show title by a confirmation of a board of Commissioners.

The policy of the law required that those lots which had not been inhabited, cultivated, or possessed, prior to the 20th day of December, 1803, should be appropriated to the support of schools, with the exception of such only as the President of the United States might think proper to reserve, for military purposes; and that policy also required, that all the other lands in the ceded territory, should be offered for sale as soon as convenient, with the exception of such as was rightfully claimed by individuals. There can be no reason then, why the action of the recorder on a lot claimed by one of the inhabitants for a town or village lot, should not, if the claim be confirmed, avail the claimant as much as his confirmation of an incomplete French or Spanish grant, or his confirmation of a tract of land claimed as a donation in virtue of any of the acts of Congress. The claim of those deriving title to the land in dispute then under Felicite Marly, whether it be town or village lot, out lot, common field lot, or a tract of land claimed as a donation on account of settlement or cultivation is, in my opinion, good against every person who cannot produce either a good title from the French or Spanish government, or a prior confirmation by a board of commissioners. But there is no evidence on the record that the land in dis-

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pute was on the 20th day of December, 1803, either a village lot, out lot, or common field lot. A lot in popular language, when real property is the subject matter of discourse, is a parcel of land designated by metes and bounds; and in the contemplation of the acts of Congress, which have been reviewed, it is a parcel of ground surveyed and marked out under the authority, either of the crown of France, or of that of Spain. In the case of Waddingham vs. Gamble p. 468 of the 4th vol. of Missouri decisions it appeared on the record, that common field lots were surveyed and corners established by public authority, and that all these matters were registered in a book by authority of law. It cannot then be presumed that if there ever had been, in the year 1803, a fourth street in St. Louis, some record of it would not be found. Mr. Bird, in a written argument furnished to this court says. "after the defendant had proved by the acts of the general government and its officers, by the proceedings before the said recorder, and by said patent, that the lot in question was a town lot, and was in 1814, bounded by a street, he then procures several witnesses, with bad memory, to testify to what is abundantly contradicted by the history of the settlement of this town, by other witnesses, by public documents, and could be easily disproved by the official acts of Marie P. Leduc, the strongest witness for the defendant, namely, that where the defendant now resides, was in Spanish times, no part of the town of St. Louis, that fourth street was first laid out in 1820 or thereabouts."

The recorder's certificate, dated 1st January, 1814, states, that the lot was bounded east by a street. If, indeed, the recital of the eastern boundary line of this lot by the recorder, in his certificate of confirmation, be evidence not to be rebutted, or in any manner disproved, which I believe no court ever yet decided in such a case, it cannot be urged as evidence that a street existed there anterior to the date of the certificate. The insertion of the street as the eastern limit, appears to be the gratuitous act of the recorder; nothing of the existence of the street appears either in the widow's application, or in the testimony of the witness examined;

and one street alone existing on the east side of the lot, is slender proof that it is a town or village lot. The witnesses tell us there were no cross streets. The patent dated 14th of March 1839, calls for one street on the east and another on the south. It is certain that the maker of the patent had no official information of the boundaries of this lot, other than the proceedings of the recorder, and even the recorder's proceedings did not conduct him back further than 1814. The boundaries then given to the lot by the patent on the 14th day of March, 1839, and the eastern extremity, as designated by the recorder in his proceedings on that subject on the first day of January, 1814, are no proof that on the 20th day of December, 1803, that ground, lying west of fourth street, and north of Poplar street, so called in the patent, was divided into town or village lots, and constituted a part of the village of St. Louis. To prove then the existence or non existence of a fourth street, we are reduced to the necessity of adverting to oral testimony, to which as the defendant did not object as inadmissible, because the absence of better evidence was not accounted for, this court can now make no objection.

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Three of the plaintiff's witnesses speak of fourth street, viz Antoine Smith, Louis Delille and Michal Marly, Smith says: "the lot lay on the west side of fourth street and opposite the lot of Mr. Delille, which is on the east side of what is now called fourth street: Cant say how large the inclosure about the lot was. The inclosure extended back to within the about 30 feet of Mr. Chouteau's fence. There was a space between the inclosure (where fourth street now is) and Delille's lot." Louis Delille the second of the witnesses last above mentioned says: "Marly had a lot in St. Louis directly west of his father's lot, between it and Chouteau's land. His father owned a lot on the east side of fourth street." In another place he says "there was a street there, which was considered as a street, a good deal used, and we did all our hauling on it, and so did others."

The sum of what these two witnesses state, is that there was an open space betwixt the inclosure of Marly, and that of Delille; and that this open space was, at the time when

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they were testifying, called fourth street. But Michel Marly, brother to John Baptiste Marly, and who, from his testimony, appears to have made the inclosure for his deceased brother, and to have resided with him many years before his death, says that he is now sixty years old, does not know the direction of fourth street, there was no street there at that time—there were “only barns there.” This testimony appears to have been given on the first trial in the circuit court, and on the second he testifies to the same purpose, confirming the testimony of Chouteau, Paul, and Leduc, among others, witnesses of the defendant. Chouteau testified, that he came to St. Louis, before a house was built in it, and that there never was any street, marked out in it, west of third street, before the occupation of the country by the American government.

Leduc states, that he had been a resident since 1799, and that fourth street was not marked out or surveyed, till about twenty years before the time he testified, that is to say in 1817, and Paul states, that he became a resident of St. Louis in 1809, and never heard of fourth street till he surveyed it in 1816, when Chouteau and Lucas made their addition to St. Louis. What Mr. Bird means when he says, in his written argument before referred to, viz: that the testimony of these witnesses is abundantly contradicted by the history of the settlement of the town, is not so very obvious to me, I am not informed that the history of the settlement of St. Louis is good evidence in a court of record, even if preserved in a bill of exceptions. History is most commonly but hearsay evidence. To what history he refers he does not tell, whether traditional or something more authentic.

But it certainly cannot be that this court can take any notice of any evidence not appearing on this record, without transgressing the longest and best established rules of proceeding in appellate courts. The testimony given in this case raises a very strong presumption that all the land lying west of fourth street itself, was public property, when the American government took possession of the territory.—Felicite Marly got a lot granted to her with a very indefinite boundary, viz: east by a street separating it from the lot

of Louis Delille. The owner of this lot in 1816, when we are told Lucas and Chouteau made their addition to St. Louis, must have been a poor calculator if he had not known how to reconcile himself to the streets traced out two years after his title had accrued.

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He was still separated from Louis Delille by a street, and that was all the recorder called for. It was quite immaterial to the owner if the street separating his lot from that of Louis Delille were twice as wide as the old streets, and certainly no injury to his property, that Poplar street came then into existence, on the southern extremity of his lot, as I before observed, it is my opinion, that none of this evidence ought to have gone to the jury, to prove that the contested property was a town or village lot, or out lot, had it been objected to; but one of the plaintiff's witnesses speaks directly as to the existence of fourth street under the government of Spain and he says there was no fourth street, while several of the defendants witnesses testify as strongly as can be testified to a negative, saying there was no fourth street till about the year 1816. In case the contested ground be not a town or village lot, out lot &c. surveyed and marked out by authority of law under either France or Spain, the act of Congress expressly declares, that the claimants must file a notice with the recorder; and the deceased John B. Marly did not file one, nor did any one of his heirs claim in his right. but the widow claimed, and it was confirmed to her.

But had the confirmed lot been proved to be a town or village lot, I am of opinion, for reasons above given, that it was a duty of the persons claiming it, to file a notice with the recorder, and procure an adjudication or confirmation of the claim, if such person or persons, wished to avail himself, or themselves, of any benefit offered by the act of Congress of 13th of June, 1812. But neither John B. Marly, nor his heirs, having done this, and Felicite Marly having procured the lot in question to be confirmed to herself, all persons are now concluded by this adjudication, or confirmation, of the recorder, except those who may be able to produce either a complete French or Spanish grant, or

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confirmation of the same property by the board of commissioners made prior to that of the recorder of land titles.

The instructions given by the circuit court will now be reviewed.

In a declaration in ejectment, the description of the premises contended for must be such as to enable the jury to identify them, with the description contained in the deeds upon which the plaintiff founds his claim; and other evidence is inadmissible to identify the premises described in the declaration, with those described in the deed.

The first instruction given for the defendant seems to me unobjectionable. The plaintiff had attempted to set out the premises contended for, and if he did not give a true description, such as the jury could identify with the description contained in his deeds, the foundation of his claim, he certainly ought not to recover.

In the second, the court, at the defendants instance instructs the jury to disregard all parol or other evidence, independent of, and extrinsic to, the deeds which had been offered by the plaintiff to explain any doubt or ambiguity, apparent and patent, on the face of the deeds respecting the premises conveyed, or intended to be conveyed. The words "doubt" and "apparent" used by the defendant in this second instruction, were, I suppose, intended by him to convey the same idea as the other two words with which they are connected, viz: "ambiguity" and "patent." If they mean any thing else, I do not know what it is, and he has failed to explain them. They will then be treated as mere verbiage. An ambiguity patent is thus described: "when a clause in a deed or will, or any other instrument, is so ambiguously or defectively expressed, that a court, which has to put a construction on the instrument, is unable to collect the intention of the party; and in such case evidence of the declaration of the party cannot be admitted to explain his intention." Whether then an ambiguity is patent or latent, is the province of the court, and not of the jury to decide; and the defendant ought to have called the attention of the court to what he conceived to be the ambiguity patent, and to have required the court to instruct the jury, that such ambiguity could not be explained by any evidence, to be produced by the plaintiff, dehors the deed itself. The description of the property is sufficiently vague. But if the plaintiff was content to take it on such description, the laws referred to in the deeds show that the evidence of the vendors title, if any is to be found, in the case of a right of pre-

It is error in the circuit court to give instructions to the jury that involve questions of law; therefore, where, as in this case, the court instructed the jury, that they were to disregard all evidence to explain any ambiguity pa-

emption, in the registers office of the district where the land lay; and in case it be a town or village lot, out lot, common field lot, or land claimed by right of donation under the second section of the act of 12th of April 1814, in the office of the recorder of land titles at St. Louis. The United States have provided whenever a claim is confirmed, whether by the recorder or by the register and receiver of the land office, that it shall be sufficiently described to ascertain its locality. This instruction was clearly wrong, it being no part of the business of a jury to ascertain what is an ambiguity patent in a deed. The third instruction seems to have been framed under the belief, that the contested property, had it been proved to have been a town or village lot, out lot, or common field lot, on the 20th day of December, 1803, would have been confirmed to John Baptiste Marly and his legal representatives, by the 1st section of the act of 13th of June 1812, by which it may be recollected that the rights, titles, and claims to such lots, were confirmed to the inhabitants of the several towns or villages, according to their several rights; and it was the intention of the defendant to say, that, although, if the contested property were proved to be a town lot, out lot, or common field lot, the plaintiff might succeed in his case, yet, if the land were either a settlement right, under the second section of the act of the 12th of April, 1814, by right of donation, or under the fifth section of the last mentioned act, as a pre-emption he could not succeed. In this view, the instruction was in my opinion correctly given. For neither John Baptiste Marly nor the vendors his heirs, had filed a notice with the recorder, that this land was claimed by right of donation under the second section of the act of 12 of April 1814, nor did it appear in evidence that this land had ever been adjudged to them by the register and receiver of the land district where it lay, under the 5th section of the same act as a pre-emption right. But I have before given it as my opinion that even in the case of a town or village lot, out lot, or common field lot, the jurisdiction of the recorder still continued, and that it was a part of his duty, under the first section of the act of 13th of June, 1812, to ascertain to whom those lots, out lots

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tent on the face of the deed, the Supreme court held such instruction to be erroneous, as it was the province of the court, and not of the jury, to decide whether the ambiguity was patent or latent. The party should have called the attention of the court to what he conceived to be the ambiguity patent and required the court to instruct the jury, that such ambiguity could not be explained by any evidence dehors the deed.

Plaintiff claimed under one M. who, it was proved, prior to 20th Dec. 1803, had enclosed and cultivated the land in controversy; and, in support of his claim, relied upon the acts of Congress of 13 June, 1812, "mak-

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ing further provision for settling the claims to land in the territory of Missouri": also the acts of April 12, 1814, and April 24, 1816, granting pre-emption rights in certain cases. The defendant claimed under a confirmation, by the recorder of land titles, to the widow of said M. Held: that as the plaintiff had failed to prove that the land, in controversy, was either a town or village lot, out lot, common field lot, or commons, within the provisions of the act of June 13, 1812, and had shown no compliance with the said pre-emption acts, nor any grant from either the Spanish or French governments, or confirmation by a board of commissioners, he could not prevail against the defendant,

&c. belonged at that time, and that his decision, on the right of property in one of these lots, was as conclusive as his decision on a claim made to land by right of donation under the 2nd section of the act of 12th of April, 1814. The third instruction then, was, in my opinion, wrong only in being too narrow: that is, the defendant committed error against himself; and of this the plaintiff has no right to complain.

The fifth instruction, was in my opinion, incorrectly given. John Baptiste Marly might, if the property here in dispute had been neither town nor village lot &c. in 1803, still have claimed it by right of donation under the 2nd section of the act of 2nd April, 1814, and as before observed, it appears very satisfactorily to me, on this record, that both the contested land and other land adjoining, was a part of the public domain at that time. The same observation may be made of the 12th instruction as of the third. I can see no reason the jury should be told by the court, that if the plaintiffs had not proved that Marly claimed the premises in the declaration mentioned, either from the French or Spanish or American government, they must find for the defendant. The plaintiff pretended to set up no grant either by France or Spain, and depended solely on the provisions made by the several acts of Congress, and therefore ought to have claimed from the United States (or from the American government as the defendant has it) through the recorder of land titles, the agent appointed by law for the purpose of receiving such claims, and deciding on their validity. No injury is however done to the plaintiff by this surplussage in the 12th instruction.

Having before given my opinion that the plaintiff had not produced any evidence of title in his vendors to the contested property, it becomes useless to examine the 13th instruction. If ever a good reason existed why a jury should find a verdict for a defendant in an action of ejectment, it must exist when the plaintiff gives no evidence to sustain his case. The court committed then no error on the score of evidence in refusing to allow the plaintiff a new trial. But the defendant succeeded in procuring from the court a very improper instruction to the jury viz: that they must disregard al

evidence offered by the plaintiff to explain any ambiguity patent on the face of the deeds given in evidence, without telling the jury in what that ambiguity patent consisted, and as I believe when no such ambiguity existed in the deeds offered in evidence by the plaintiff. Had the plaintiff offered any evidence of title in himself from which the jury might by possibility have found a verdict for him, his right to a new trial would have been undoubted. But according to the evidence in the record, he relies on the bounty extended to the inhabitants of the ceded territory in the several acts of Congress above enumerated. Congress, when they confer a favor have an indisputable right to confer it on their own terms. The recorder was their agent, appointed for the special purpose of deciding not only who was on the 20th day of December, 1803, such an inhabitant as was entitled by the operation of the several acts of Congress to a town or village lot, out lot, or common field lot, or a tract of land by right of donation, but he was also their agent appointed to decide in whom the property in such lot, or tract of land, vested at the time of the application made to him for the confirmation of such property. Felicite Marly applied to him, claiming the property, and he confirmed it to her, that is, he decided it was her property, and his decision concludes all persons who cannot show either a grant from France or Spain, or a prior confirmation by the board of commissioners.

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whose confirmation concluded all persons not able to show a complete Spanish or French grant, or a prior confirmation by a board of commissioners, or bring themselves within the provisions of said acts of Congress.

The judgment of the circuit court will not be reversed, on account of erroneous instructions given, where the party complaining has shown no right of action.

Shall then this judgment be reversed because of the wrong instructions procured by the defendant from the court, and the cause remanded to the circuit court in order to allow the plaintiff to search for evidence of a grant from France or Spain, or for a prior confirmation by a board of commissioners? Had the crown of France or Spain ever made a grant of this land to the plaintiff's vendors, it is not to be presumed that he would have rested his claim on the acts of Congress passed for the benefit of such as had no grants, and if it had ever been confirmed to those under whom the plaintiff claims, by a board of commissioners, we cannot presume that the claim would have attempted to be sustained on the construction of the confirmation of the recorder to

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Felicite Marly. The plaintiff then having introduced no evidence calculated to establish any right to this land, either in himself, or in those under whom he claims, it is my opinion that it is improper to reverse this judgment because the circuit court gave erroneous instructions to the jury. To reverse a judgment and remand a cause to the circuit court under such circumstances would be holding out an inducement to the plaintiff to use improper means to procure testimony to sustain his case. The judgment of the circuit court ought then in my opinion to be affirmed. It being also the opinion of Judge Napton that this judgment ought to be affirmed, it is accordingly affirmed.

Separate opinion of Napton Judge.

I concur in affirming the judgment of the circuit court, on the ground that there is no evidence on the record of so decisive a character that Marle's inclosure was a village lot, as would require this court to set aside the verdict of the jury. I do not concur in so much of Judge Tompkins opinion as considers the claimants under the act of 13th June 1812 under the necessity of taking further steps before the recorder for the purpose of perfecting their titles.

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1. The courts of this state, in determining the validity of an assignment made in another state, will be governed by the laws of Missouri.
2. An assignment by a debtor of all his property to trustees, for the benefit of such creditors as should, within a given time, execute a release, is void.
3. Where the schedule, annexed to a deed of assignment, contains only a list of the preferred creditors, without specifying the amount of their several claims, such omission will not invalidate the deed, if it be unexceptionable in other respects.

Error to the Circuit Court of St. Louis county.

H. R. Gamble for Plaintiff in error.

1. That the assignment is void on its own face, because it imposes the condition of executing a release by the plaintiff; and by creditors in like condition, before they can take any interest in the trust fund: 5 Ohio Reports 293. 11 Wendall 187. Mr. Justice Story in 4 Mason's Reports 206 sustains

6	302
53a	115
6	302
65a	71

an assignment with this clause requiring a release upon what he considers the then weight of authority. But examining the authorities which preceded that decision of Judge Story, it will be seen, that there was no such preponderance of authority in favor of such assignments as was equal to his own opinion to the contrary.

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Chief Justice Tilghman in *Lippencott vs Barker*, 2 Binney 174, confines his judgment to the circumstances of the case then before the court, and expresses his distrust of the legality of such assignments. Chief Justice Marshall in 7 Peters 613, while he yields to the Pennsylvania law in a case arising under it, expresses the doubt of the court as to validity of such assignments upon principle.

The authority of Massachusetts decisions is not considered as decisively on either side of the question, as is said by Judge Story in 4 Mason 229. The authority of the New York cases ending with 11 Wendall, is decidedly against such assignments; and the decision in 5 Ohio Rep., made upon an able review of the whole course of decision by other courts, is of great weight against the assignment in this case.

2nd point. That the assignment is fraudulent, as against the plaintiff, because there is no schedule of the preferred debts. See *Angel on assignments* 71. 4 Mason 219. The case in 3 Missouri Reports 252, has no likeness to the present, in this, that the assignment there, required no release.

3rd point. That there was no evidence of the existence of the preferred debts. 5 Mo. Rep., 485 and 463.

4th point. That the trust created by the deed after paying the preferred creditors, and those who agree to release, is for the benefit of the grantors, and not for the other creditors generally; so that there is, substantially, a reservation for the benefit of the debtor, while a portion of the debts remain unpaid, *Hyslop vs. Clark*, 14 John Rep. 458. *Austin and others vs. Bell*, 20 John Reports 442.

The view of this clause, as taken by Judge Story in 4 Mason that it only operates to create a resulting trust which the law itself would create; while it is true in fact, is no answer to the objection that this clause gives character to the

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instrument, and carries out the purpose of hindering and delaying the non-assenting creditors. If a release could rightfully be required of any creditors, honesty would seem to demand that the surplus, after paying such creditors, should, without coming back to the debtor, be at once appropriated to the payment of his other debts. If this clause is void, as creating a trust for the benefit of the grantor, then the whole deed is void, 20 Johns Rep. 442.

Spalding for Appellee.

1. The requiring a release does not invalidate the assignment. Angell on assignment 96-105. 4 Mason Rep. 206. 3 Price's Rep. 6.

2. The want of, or defect in, schedules of property conveyed, or creditors provided for does not make it void. 3 Mo. Rep. 252, Deaver vs. Savage et al. Angell on assignment 71. 7 Peters Rep. 614.

Opinion of the Court delivered by Napton Judge.

This was an action of assumpsit brought by George Brown against John Knox, James Boggs and James A. Knox upon sundry notes executed by them to William McKee and co., and endorsed to plaintiff: an affidavit was made that the sum due, after giving all just credits, was at least 18,000 dollars, and an attachment was issued, upon which various persons, in different parts of this State, were summoned as garnishees.

William Wilson, and David Knox interpleaded, and claimed all the debts and effects attached. The issue thus made up, between the interpleaders and the plaintiff, was submitted to the court sitting as a jury, who found in favor of the claimants. The plaintiff moved for a new trial, because the finding was against law, against evidence, and against the weight of evidence; and, because the deed of assignment, offered in evidence, was void. The motion was overruled by the court, and a bill of exceptions taken to the opinion of the court.

From the bill of exceptions it appears, that in 1825, John Knox and James Boggs were in partnership, in Philadelphia, under the firm of Knox and Boggs: that they then took into the concern David Boggs, when the style of the firm was

changed to Knox, Boggs and company. In 1831, David Boggs retired from the firm, and the style of the firm was again changed to Knox & Boggs. In January 1836, James A. Knox was admitted a partner, but brought no capital into the concern, and received only one tenth of the profits. The firm was then styled Knox, Boggs and company, and continued thus until May 1837, when an assignment was made of the effects of the firm of Knox and Boggs, and Knox, Boggs and company to Wilson and Knox the interpleaders.

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The assignment is made of all the property of the firm, both joint and several, and executed by all the partners: notices of the same were published in the Gazettes of Philadelphia, and circulars sent to the debtors of said firm. It was proved, that the assignees forthwith took possession of the property and effects assigned, and have been ever since acting in discharge of the trust. It was also testified by a witness, who declared himself to be a lawyer of Philadelphia, that the deed was drawn up by him, and was in the usual form of such conveyances in Pennsylvania, and, by the laws of Pennsylvania, was good.

The trusts declared in the deed are:

First. That the trustees shall dispose of the property and collect the debts assigned.

Second. Out of the proceeds pay the expenses of the trust and retain a compensation to themselves.

Third. Out of the separate estate of each partner pay the household and family expenses &c., of each partner respectively.

Fourth. Pay debts in certain specified schedules, to the number of four, and

Lastly. To pay the residue to all such of their creditors as would execute a release within the term of three months, if they lived within the United States, or nine months, if they lived without the United States.

The deed contains this further provision, that after the payment of all the debts therein specified, the surplus, if any, shall revert to the assignors.

The schedule annexed, contains a list of preferred creditors

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with a description of the nature of their respective claims, as for money lent, acceptances, &c., but does in no instance show the amount of the claim. The amount of assets assigned is set down in the schedule as exceeding half a million of dollars, and creditors, to the amount of an hundred thousand dollars, came in and executed releases. There was no proof as to the bona fide character of the preferred debts.

It was admitted, that plaintiff resided in Baltimore, and that all the debts, effects &c., in the hands of the garnishees, were embraced in said deed of assignment, and the only dispute is, as to the validity of the assignment.

Before examining this question, it will be proper to dispose of a preliminary one started in the argument of this cause. The interpleaders claiming under a deed made in Pennsylvania, and the plaintiff being a resident of Baltimore, it is urged, that principles of comity require, that the validity of this instrument should be determined in this court, by the laws of Pennsylvania. It is not very well perceived, how the law of comity can be applicable to the consideration of an instrument which is attacked on the ground of fraud in fact, or because its provisions so far contravene the established policy, or express enactments of our law, as to constitute fraud per-se. But admitting that our courts would be bound, upon principles of comity, to give effect to an assignment made in Pennsylvania, as against creditors living in that State, upon what principle must the Pennsylvania law be administered here, to a creditor who resides in Maryland? Why may not he insist on the *lex domicilii* with the same justice as the assignors who live in Philadelphia? The *lex loci contractus* can hardly apply in this case, inasmuch as the creditor suing, never acceded to the terms of this assignment, and was no party to the instrument; and the law of his

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domicil may as well be applicable to the contract on which he sues, as the law of the interpleaders domicile to that contract on which they rely. The only reasonable and fair rule, in a case of this character, seems to be, to administer the law of this State, the State in which the property lies, where the suit is brought, and whose laws are invoked for the protection of the rights of the respective parties. Whatever

may be the construction given to instruments of this character in Pennsylvania then, I shall proceed to consider the light in which they are viewed by the law of Missouri, in the opinion of this court.

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The first and most important question involved in this consideration, is the validity of a stipulation for a release in the instrument of assignment under which the interpleaders claimed. It is conceded that this is a question of the first impression in this state. The point has been neither collaterally, or directly, before the court in any previous case.—It is conceded also that the adjudication of the courts of our sister states have, on this subject, been various, conflicting and unsatisfactory. The weight of authority has been claimed on either side, and I apprehend that a very brief examination of the state of judicial opinion will make it obvious that this court may, with propriety, and a due respect to the opinions of other tribunals, look only to justice, to reason and morality, and to the letter and spirit, and policy of our laws, for their rule of action.

In 1826, Judge Story, in the case of *Halcey v. Whitney*, (1 Mason's Rep. 206,) reviewed the state of judicial opinion in the United States, up to the time of that decision. He prefixes his own opinion, untrammelled by authority. "This objection" (says Judge Story, speaking of a stipulation for a release) "has struck me to be of great force, and I have paused upon it with no small hesitation of opinion. Where a debtor assigns all his property for the benefit of all his creditors, without stipulating for any favor to himself, he cannot be said to lock up his property from his creditors.—The most that can be said is, that he locks it up from one by giving it unconditionally to all. But when he stipulates for a release, he surrenders nothing except upon his own terms. He attempts to coerce his creditors by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and if the assignment be valid, to some extent, a defeating of their rights. It is not sufficient to say that it is a proposition to creditors; so would be a condition by the debtor to receive a gross sum. The

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object and nature of the proposition are to be considered, in order to decide whether it be fraudulent or not. Has it not a tendency to obstruct the common rights of the creditors? Is not its design to prevent creditors from receiving compensation out of the debtors property, without yielding up some portion of their debts, and conferring on him a substantial benefit, which he has no legal claim to demand?

The learned judge then proceeds to review the adjudicated cases, and arrived at the following conclusions, after examining the cases of *Leaving v. Binkerhoof*, (5 Johns. Ch. R. 329,) *Hyslop v. Clark*, 14 John. R. 459,) *Austin v. Bell*, (20 John. R. 442,) he admits that the courts of New York, though the point had not been expressly determined, had evinced a decided leaning against the validity of such stipulations. In Massachusetts, the question remained in Judge Story's opinion, *in equilibrio*, so far as judicial action was concerned, but the prevalence of such stipulations without objection in that state, induced him to conclude that the opinion of the profession was decidedly in favor of the debtor, on this point. In Pennsylvania, but one decision had been made, (*Lippencott v. Barker* 2 Binn. R. 174.) at the time of Judge Story's decision in *Halcey v. Whitney*, and in that, the stipulation was sustained, but was sustained, as Judge Tilghman declared, under the particular circumstances of the case, and was not designed to settle the general principle. Judge Brackenridge declined going even to that extent, but declared the stipulation void, under all circumstances. But one British authority was alluded to by Judge Story, and that was a case in the exchequer, (*Braddock v. Watson* 3 Price Rep. 6,) in which the assignment was held good, notwithstanding the stipulation for a release.

The conclusion to which Judge Story arrived, on an investigation of these authorities, was this: "I am free to say, that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them, as it is, I yield without reluctance to what seems the tone of authority in favor of them."

Such was the state of judicial opinion in 1826, when

Judge Story yielded his own convictions to what he regarded as the "tone of authority." We will see how the authorities stand since that period, and for that purpose I avail myself of the compilation read at the bar, (Angel on assignments,) and take the statement of its author for the titles and character of the decisions as late as 1835. In 1833, the case of *Brashear v. West* and others was decided by the Supreme Court of the United States, 7 Peters R. 608. In that case Chief Justice Marshall, in delivering the opinion of the court, observed: "The objection, (to a stipulation for a release,) is certainly powerful that its tendency is to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release, and thereby entitle themselves under the deed.—The weight of this argument is felt. But the property is not entirely locked up, a court of equity, or courts exercising chancery jurisdiction, will compel the execution of a trust and decree what may remain, to those creditors who have not acceded to the deed. Yet we are far from being satisfied that, upon general principles, such a deed ought to be sustained.

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But whatever may be the intrinsic weight of this objection, it seems not to have prevailed in Pennsylvania. The construction which the courts of that state have put on the Pennsylvania statute of frauds, must be received in the courts of the United States."

Judge Marshall here apparently yields his own conviction, that upon general principles these stipulations cannot be sustained, to what he supposes to be the settled construction, he relies on the cases already alluded to, and referred to, by Judge Story, in the case of *Halcey v. Whitney*, of *Lippencott v. Barker* and *Pierpoint* and *Lord v. Graham*, (4 Wash. R. 232). Let us examine this case of *Lippencott v. Barker*, upon which Judge Marshall and Judge Story rely as authority for declaring the settled law of Pennsylvania. Chief Justice Tilghman delivered the opinion of a majority of the court in that case, and after sustaining the assignment says: (2 Binn. R. 182,) "I beg, however, to be distinctly understood, that my opinion is confined to the circumstan-

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ces of the present case, for there are many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases." Judge Breckenridge declared: "I think it to the let and hindrance of creditors, and that such disposition is void both at common law and by statute; though not fraudulent in fact, yet fraudulent in law and therefore void."

One would suppose that there was nothing very decisive in this opinion in favor of these stipulations; Judge Tilghman expressly declaring that he was not to be understood as sustaining the general principle, but justifying his conclusions on the particular circumstances of the case, and Judge Breckenridge avowing his convictions that no circumstances could make such deeds valid in law.

In *Mackie v. Cairns*, in New York, (Hopkins Ch. R. 373, 5 Cowen R. 547,) the assignment provided that if any of the creditors should have attached, such creditors should be excluded, unless they would relinquish their attachments; and this provision was held illegal and void. In *De Cales v. Le Roy de Chaumont* (2 Paige's Chan. Rep. 491) we are told by Mr. Angel, (Angel on assignments 107,) an assignment of the debtor, which contained a provision for the distribution of the effects, among such of the creditors as should come in and accept the provision made for them, and execute releases, was carried into effect by the court of chancery, without any intimations from the court or counsel that such a stipulation was illegal. Here the point, it seems, was not made, but in the same state, in the subsequent cases of *Armstrong v. Byrne*, (1 Edwards Ch. R. 79,) and *Lentilhon v. Moffat*, (ib. 451,) such stipulations were repudiated by the court, and pronounced a hindrance and delay of creditors.

In Massachusetts, the decision in *Halsey v. Whitney* seems to have been followed up to 1829, and since that time we have no information that the validity of assignments, containing stipulations for releases, has been questioned in that state. Such, also, has been the current of decisions in Rhode Island, (Angel on assignments p. 112.) In Maine the same conclusion was arrived at, in the case of *Fox v. Adams*, (5 Greenleaf R. 245,) and on the authority of the case

of Halcey v. Whitney, but subsequently to that decision, the district court of Maine held, in the case of Lord v. Brig Watchman, (Angel 113,) that an assignment by an insolvent debtor of all his property to trustees, in trust for the benefit of such of his creditors as should become parties to the assignment and release their debts, was fraudulent. A similar adjudication has been made in Connecticut, (Angel on assignment, p. 114).

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Such is the relative weight of authority, since Judge Story's decision in Halcey v. Whitney, up to 1833, and on this state of facts, the author of the compilation on assignments concludes that the weight of American authorities was, at that date, in favor of the validity of such stipulations.

It remains to be seen how the authorities have been since the publication of that work. The case of Atkinson & Rollins v. Jordan, Ellis & co., in Ohio was decided in 1832, previous to the publication from which I have quoted authorities, but is not noticed in that work. In that case, (5 Ohio Rep. 293) the court reviewed all the authorities, and upon the weight of authority, as well as upon principle, declared such stipulations for releases, null and void. In New York, perhaps the most commercial State in the Union, the court of errors, after elaborate argument in the case of Srover v. Wakeman, determined such stipulations to be void and fraudulent. 11 Wendall 187. Judge Sutherland, after noticing the conflict of authorities on the subject, declared his opinion that it was time that some plain, simple, but comprehensive principle should be adopted on the subject. "In the absence of a bankrupt law," he proceeds, "the right of giving preferences must probably be sustained. Let the embarrassed debtor therefore assign his property to whom he pleases, but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from fears and apprehensions of creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditors; and above all, let it not put up his favor and bounty at auction, under the cover of a trust, to be bestow-

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ed upon the highest bidder. After the maturest reflection on this subject, I have come to the conclusion that the interests both of creditor and debtor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts.

The decisions, on this point, in England are but few, in consequence of their bankrupt laws rendering such assignments rarely, if ever, necessary. A case determined in the Exchequer, (*Rex v. Watson*, 3 Price R. 6.) has been frequently referred to, by the several judges in this country who have sustained such assignments, as an authority in support of such opinion. The decision of the court in that case cannot, I think be entitled to great weight here, when we reflect that it was the policy of the British legislature, as evinced in their bankrupt laws, to relieve debtors from future liability, on giving up their entire property to their creditors.

On reviewing these various and conflicting opinions, it will be seen, that the opinions of three eminent jurists, Judge Story, Chancellor Kent and Judge Marshall were against the validity of these stipulations for releases, notwithstanding two of them decided on the supposed authority of prior decisions, in their favor; and it is worthy of remark, that scarcely any Judge, in deciding favorably to such assignments, has failed to accompany such decision with a declaration, either of his marked aversion to these stipulations, upon principle, or of great doubts as to their propriety and legality. In Ohio, New York, Maine and Connecticut, courts of the highest authority have pronounced them fraudulent, whilst in Massachusetts, Rhode Island and Pennsylvania, the decisions have been conflicting, but preponderate in favor of the validity of the stipulations for a release.

In this state of judicial opinion, it will not be considered as assuming too much, to say, that this court may safely take up the subject, untrammelled by authority, and pronounce that judgment which a fair construction of our statute of frauds, and the general policy of our laws will justify.

In examining this question on principle, the only matter of astonishment it seems to me, is, that courts, in this country, could ever have been induced to give a judicial sanction to what seems to be neither more or less, in its incipient state, than a species of *mercantile legislation*. Debtors have succeeded, by these contrivances, in making bankrupt laws for themselves, notwithstanding the legislative bodies, both federal and state, have declined to pass laws to relieve them from their liability to pay their debts. This alone, in my opinion, constitutes a fatal objection, to any assignment, in which the debtor makes over his property, on condition that his creditors shall release him from future liability, shall it be said, that the debtor has a right to make terms, and that, when he succeeds in making such as are beneficial to himself, and such as the law of itself would not give him, it is a matter of contract and therefore valid? To make a contract of any validity, I suppose it will be granted, there must be parties to such contract, capable of contracting, and voluntarily assenting to such contract. How can the creditor be said to give any assent to this contract, when in point of fact, if these assignments be valid, he is under moral duress when he signs the deed. The debtor has his creditors completely in his power, and says to them: "you may take this fifty cents in the dollar of all I owe you, or nothing." There is no choice left with the creditors, but to come in and take half or a fourth of their debts, as the case may be, and then, in consideration of this favor, release all claims for the balance.

It has been said, that the judicial decisions, against the validity of these instruments, have been a species of judicial legislation, enlarging the operation and bearing of the statute of frauds. It seems to me that with much more propriety it might have been said, that the decisions sustaining these assignments have been judicial legislation, not enlarging the operation of any statute in existence, but creating, what our Legislatures have refused to make—an act of bankruptcy. The statute of frauds declares that all deeds made with intent to hinder and delay creditors, shall be deemed fraudulent and void. I do not place the invalidity of these

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stipulations for release, upon the sole ground that they occasion a delay, and are therefore within the letter of the statute. Delays to some extent are occasioned by all assignments, whether containing such a stipulation or not, though the delay is somewhat greater in the one case than in the other. There might be much difficulty in determining precisely what amount of delay should annul the deed, and where it is not unreasonable, as I think the case in this particular deed, it would not, of itself, warrant a court in declaring such deed void. But in addition to the delay gained, the debtor obtains a benefit, and a most material benefit, which the law of itself does not give him, and obtains it too by a sort of compulsion on the creditor.

Whatever may be said in favor of the policy and humanity of a bankrupt law, and it is not intended here to question them, our legislature has not seen fit to enact any law by which the debtor can escape his liabilities by delivering up his property. On the contrary, the spirit of our legislation, so far as it has gone on this subject as evinced in the insolvent laws enacted, excludes all debtors, who seek to give preferences to one creditor over another, from the benefits to be derived from those laws. It appears then to be in strict conformity to the letter and spirit of our statute of frauds, consonant to the general policy of our statutes, and I think I may add, according to sound views of morality and common honesty, that a debtor should not have the privilege of dictating terms to his creditors, and of excluding a bona fide creditor from all benefit in his property, who will not accede to those terms. Such is the view entertained by every member of this court, and the circuit court ought, in my opinion, to have declared this assignment fraudulent and void, as against the rights of the attaching creditor.

This view of this assignment might well dispose of this case, but other objections have been taken, which as they are fairly up, I will proceed to notice. The schedule annexed to this assignment was objected to, as imperfect, insufficient, and a badge of fraud. The schedule contained a list of preferred creditors, but did not specify the amount of their

An assignment by a debtor of all his property to trustees, for the benefit of such creditors as should, within a given time, execute a release, is void.

several claims. In my opinion, if this deed were unexceptionable in other respects and imposed no terms on the remaining creditors, no such omission would be sufficient of itself to invalidate the deed, nor would it raise any presumption of fraud. But in this case, it was very material, to enable the creditors to determine whether they would accept the terms held out or not, that they should have the means of ascertaining the probability of deriving any benefit from the conveyance. A mere list of the names of the preferred creditors could throw no light on this subject. Some estimate of the aggregate amount of preferred claims, if not the specific items, would seem to be reasonable and attainable. This position is sustained, I think, by the observations of Judge Story in the case of *Halcey v. Whitney*, where a similar objection was made, but was not sustained by the court. The objection taken there was, that the schedule was not perfect, but allowed alterations and additions to be made to the schedules, by the mutual consent of one of the parties to each part of the assignment. The Judge observed, "The trustee must be presumed to act honestly, and does in fact covenant with all the parties for a faithful performance of his duties. A clause reposing confidence in him in the discharge of his duties can surely not be deemed fraudulent from that fact alone. If the trustee were notoriously insolvent, or of bad character, (which is not pretended here,) such a clause might be deemed an auxiliary ground for presumptive fraud. But a power of this nature, simply because it may be abused, is not to be deemed unreasonable or fraudulent."

It is, I think, fairly inferable from this reasoning, that if the list of preferred creditors was not merely imperfect, but contained no statement of the extent of their claims, no doubt would have been entertained of its suspicious character, in an instrument requiring the creditors to accept terms and conditions.

It was further objected to the efficacy of this assignment, so far as the attaching creditor was concerned, that no proof was given of the bona fide existence of the preferred debts. I am not prepared to say, that this circumstance of

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Where the schedule, annexed to a deed of assignment, contains only a list of the preferred creditors, without specifying the amount of their several claims, such omission will not invalidate the deed, if it be unexceptionable in other respects.

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1840.

Brown
vs.
Knox, Boggs
and Knox.

itself would create any presumption against a deed otherwise fair, and it would seem to me proper, that some suspicion should first be cast upon the transaction, by the party seeking to overturn it, before the persons claiming under the deed could be required to prove that the debts set forth were genuine and bona fide. A majority of the court, however, entertain a different opinion on this point and think such proof always necessary to establish the deed in opposition to the claims of an attaching creditor. 5 Mo. Rep'ts. 485, 463.

The only remaining objection to this deed is that the trust created by it, after paying the preferred creditors and those who agree to release, is for the benefit of the grantors, and not for the other creditors generally. This objection seems to be resolvable into the first, and principle one, urged to the whole instrument, the requisition of releases. If the deed containing a stipulation for releases, were valid, the trust avowed on its face that the remainder should return to the assignors, would amount to no more than the law itself would create. It would only make the delay greater, but would certainly not protect the property from the process of the courts. For the law would also declare, that after reverting to the assignors, it would be a mere trust in their hands for the benefit of the unpaid creditors. This objection therefore, forms a part of the first objection and is so viewed by this court.

The judgment of the circuit court is reversed and the cause remanded.

DRAKE V. ROGERS & SHREWSBURY.

MAY TERM
1840.

1. A deed of assignment for the benefit of such creditors as should, within a given time, become parties thereto and execute a release, would be of no avail until executed by the creditors, even though such deed were not void on account of the stipulation for a release.
2. It would seem that a deed of assignment, in order to pass partnership effects, must be executed by the dormant as well as the active partners.

Drake
vs.Rogers and
Shrewsbury.*This with Henry.*6 317
35a 674

Appeal from the Circuit Court of St. Louis county.

Spalding for Appellant.

1. There is no fraud in fact proved; this will be apparent from an inspection of the record, &c.

2. The deed is a valid one. 1. It was a sufficient deed to pass the partnership effects, Collyer on partnership 424-5, and 492-3, as to all partners suing and being sued where there is a dormant partner. Angell on assignments 49, 50 &c. 1 Paige's Ch'y. Rep. 517. 4 McCord's Rep. 519. 4 Wash. Rep. 232. 4 Day's Rep. 428, 5 Cranch Rep. 300.—

2. The fact of a release being required does not invalidate it, Angell on assignment 95-105, &c. 4 Mason Rep. 206. 3 Price's Rep. 6.

3. It is not invalid in consequence of attachments being served before the creditors, or any of them, assented, &c. Angell on assignments 168, as to general principles. Ibid 171 n. 2, that assent is presumed as to preferred creditors. 11 Wheat. Rep. 78, (6 Pet. Con. 232,) Ibid 173, that the different decisions in Massachusetts are owing to the peculiar laws there, &c. 4 Mason Rep. 206, and Angell 19. 3 Maule and Selwyn 372.

4. It is not void for the want of, or defect in schedules of property conveyed, or creditors provided for. 3 Mo. Rep! 252, Deaver vs. Savage and al. Angell on assignment 71.— 7 Peters Rep. 614.

Gamble and Polk for Appellees.

1st- The deed of assignment set out in the answer of the garnishee, and in the bill of exceptions, and under which Drake claimed, as interpleader, is fraudulent per-se, Austin vs. Bell 20 John Rep. 442. Clark vs. Hyslop 14 do 459, and Laving vs. Brickenhoff 5 John Ch. R. 329.

2nd. The deed in question is a tri-partite deed, requiring

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Drake
vs
Rogers and
Shrewsbury.

to be executed by creditors as well as by assignors and assignee, and this attachment was issued and served, both on defendants and garnishees, before the execution of the deed by any of the creditors, and holds the effects attached in opposition to claims under the deed. See 5 Mo. R. 241. 15 Mass. R. 153. 13 do. 148, and 17 do. 457-8.

3d. This deed was not executed by Sisson, a partner of Eads & Buchanan, but only by Eads & Buchanan, and, therefore, it cannot pass the partnership effects. Hughes v. Ellwood, 13 Mo. R. 463.

4th. There was no proof in this cause, that the persons named in the schedule headed, "preferred claims," were creditors to the extent assumed; and the assignment is, therefore, void as to Rogers and Shrewsbury. See Crow & Tevis v. Ruby, 5 Mo. R. 484.

Opinion of the Court delivered by Napton Judge.

The appellees brought an action of assumpsit against Thomas C. Eads, Ezekiel Buchanan and Freeborn Sisson. An attachment issued, on the usual affidavit, which was served on the defendant Sisson, but was not executed on Eads or Buchanan. Divers persons were summoned as garnishees, and among others Ch's. Dr. Drake the appellant.—The answer of Drake, after responding negatively to the interrogatories, stated, that on the 4th April 1836, the said Eads & Buchanan executed to him a deed of assignment, a copy of which, with its annexed schedule, was attached to his answer. He further stated, that he had taken immediate possession of the goods pointed out to him as the stock of said Eads & Buchanan, and immediately placed the goods at an auction store, to be sold. He also took possession of the goods in transitu consigned to said firm, so soon as they reached St. Louis. An account of the sales is given to the amount of \$2622,89, and he admitted in his hands, as assignee, after deducting expenses of sale, \$2292,20. No disposition had been made of the lands assigned.

The deed of assignment is a tri-partite deed, between said Eads and Buchanan of the first part, said Drake of the second part, and the creditors of said Eads and Buchanan, who should become parties thereto, of the third part; the

deed was executed by Eads in person under seal; by Buchanan, by his attorney the said Drake, on 4th April 1836; by said Drake as party on the second part, on the same day; and by three creditors, who executed by their attorney Charles D. Drake under seal, on the 3rd of August 1836.

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1840.

Drake
vs.
Rogers and
Shrewsbury.

The trusts declared in the deed were. first, to pay expenses of assignment.

Second. To pay the claims of the several creditors headed, "preferred creditors."

Third. To pay the claims of those creditors who should execute the deed within four months from the date of the deed,—with a proviso, that no claim shall be paid unless claimant shall come into the deed as above stated. The deed contains a release from all the creditors.

Charles D. Drake filed an interpleader, and claimed the property attached in the hands of two of the garnishees, and the issue, upon the interpleader, was submitted to the court sitting as a jury, which issue, was found against said Drake. Said Drake then moved to be discharged as garnishee, which motion the court overruled, and the court rendered judgment against the garnishee for the amount of the judgment obtained against defendants. A motion was made by Drake for a new trial, because the verdict was against law and evidence, which was over ruled and exceptions taken.

From the bill of exceptions it appears, that Freeborn Sisson, one of the defendants in the main suit, was a dormant partner in the house of Eads and Buchanan: that he was not in the city of St. Louis, where the assignment was made, when it was executed, and the same was executed without his knowledge or consent.

The deed of assignment, in this case, contains the same stipulation for a release, which this court has pronounced fatal in the case of Brown v. Knox & Boggs, decided at this term. But two other points have been raised, distinct from those disposed of in that case.

The first is that this assignment was not executed by any of the creditors until after the levy of the attachment. The deed of assignment was a tri-partite deed, and the creditors

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1840.

Drake
vs.
Rogers and
Shrewsbury.

A deed of assignment for the benefit of such creditors as should within a given time, become parties thereto, and execute a release, would be of no avail until executed by the creditors, even though such deed were not void on account of the stipulation for a release.

It would seem that a deed of assignment, in order to pass partnership effects, must be executed by the dormant, as well as the active partners.

who were to become parties on the third part, by executing the deed, released all demands and claims upon the property of the assignors, except such as accrued by virtue of the deed itself. Where a deed is for the benefit of a party, the law would not presume his dissent, and his execution of the deed might not be necessary to its validity. But no presumption in favor of the execution of the instrument by the creditors, could be made in this case, where important benefits were stipulated for by the debtors.

Even the preferred creditors might well hesitate before they would sign this deed, where they, in common with all others who might sign would release the debtor from all future liability. The facts in this case appear to coincide very well, with this legal presumption, as we see that only three creditors signed, and not until nearly four months had elapsed after the execution of the instrument by the assignors and assignee. This assignment was therefore for this reason void against the attaching creditors.

It is also urged that this deed was insufficient to pass the partnership effects, because Freeborn Sisson, a dormant partner of the firm of Buchanan and Eads, did not execute it. This court held in the case of Hughes v. Ellison (5 Mo. Rep. 463) that one partner could not make an assignment.— But I do not perceive how the rule, admitting it to be correct could apply to a dormant partner. The ostensible partners may sue and be sued, without any notice of the dormant partner, and why may they not also make an assignment without his consent? No authority on this point has been cited, but it has not been shown how third parties can be prejudiced by such an assignment. The dormant partner might perhaps have reason to complain, but so far as the rest of the world are concerned, they have not been prejudiced. This objection ought not to avail, in my opinion, in a suit of this description. Judgment affirmed.

McGirk and Tompkins Judges concurring in this opinion, except as to the last point.

PAYNE V. COLLIER.

MAY TERM
1840.

PAYNE V. COLLIER & PETTUS.

Payne
vs.
Collier.

1. The judgment of the circuit court will not be reversed on account of a mere irregularity, by which, the party complaining, has sustained no injury.
2. It is a sufficient compliance with the 8th sect. of the act regulating "Practice at law," (R. C. 1835, p. 451,) if the original writ requires the def't. to appear before the "judge of the circuit court," &c. to answer the "demand," &c., instead of, to appear before the "circuit court," &c., to answer the "complaint" &c.

Mullanphy for Plaintiff in error.

The first error assigned is general.

The second error assigned is the circuit court's giving judgment, as by default, for want of a plea, whilst a motion to quash writ was pending and undetermined, need not be farther noticed than by saying. that altho' the circuit court does not consider a motion as equivalent to a plea for the purpose of staying proceedings until such motion be decided, it is presumable that such doctrine will scarcely be affirmed, or deemed a matter of doubtful disposition.

The third error assigned is the overruling motion to quash writ. This depends upon the sufficiency of the writ. That sufficiency will be determined by a comparison of the writ with the requirements of the sec. 8, art. 1, Practice at law, statutes of Missouri, page 451, which ordains that "the original writ, in all cases where it is not otherwise provided by law, shall command the officer to summons the defendant to *appear in court* on the return day of the writ, and at a place to be specified in such writ, to answer the *complaint* of the plaintiff." The words of the law are absolute and imperative. No discretion is left to the officer to change the command of the writ. In this case the writ does not command the plaintiff to *appear in court*, but to appear before the *Judge* of the circuit court; (*non constat* but what it might be at chambers;). The writ continues, "to answer unto George Collier of his *demand*," not to answer the *complaint* of the plaintiff. Independently of the above objections, the petition is addressed to the *St. Louis circuit*, and not to any court at all. Could any writ issue upon such a petition?

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Payne
vs.
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Spalding and Tiffany for Def't in error.

The only point in the case, so far as I know, is, whether the court erred in refusing to quash the writ. Rev. Code p. 449, also page 451 section 8. 3 Mo. Rep. 38. 2 do. 211. 4 do. 438.

Opinion of the Court delivered by McGirk Judge.

The above cases are alike in every particular, except in the last case Collier and Pettus were joint plaintiffs, and in the first case Collier alone was the plaintiff. One opinion will dispose of both cases.

Collier brought his action under the petition and summons statute. The statute gives a defendant the three first days of the term to appear and file his plea. Before the three days expired, the defendant, Payne, appeared and made a motion to quash the plaintiffs writ for the following reasons, to wit: 1st. The writ does not require the defendant to answer any action known to the law. 2nd. Same in substance as the first. 3rd. The same. 4th. The writ is not such as the law contemplates. 5th. The writ is informal, &c.

This motion was filed but no farther notice was taken of it till after the two days for pleading had expired. When the time for pleading had expired the plaintiff took judgment by default for want of a plea, without taking any notice of the motion, after the judgment by default was rendered, the defendants motion to quash came on to be heard and was over ruled.

The judgment of the circuit court will not be reversed on account of a mere irregularity, by which, the party complaining, has sustained no injury.

It is assigned for error, that the court gave judgment by default against the defendant while he was by law in court and while his motion to quash was pending. As to this matter of error, my opinion is, that the judgment by default, at most, was only an irregularity. That a mere irregularity is not the subject of error, has been often declared by this court, particularly it has been so decided in the case of Holmes and Elliott vs. Carr et al.

It has been assigned for error that the writ was not quashed on the defendants motion. I will not now enquire into the question what would have been the effect of quashing this writ, after judgment by default, inasmuch as I am of

opinion that the defect here complained of, was a proper case for a demurrer to the writ, or petition, rather than a motion to quash. The writ requires the defendant to appear before the judge of the circuit court, at the next term, to be holden &c., to answer the plaintiff's demand, instead of saying to answer his, the plaintiff's, complaint, as the statute says. Demand and complaint are, for all useful purposes, about of the same import. The words used, instead of those given by the statute, could not in any way injure or mislead the defendant; and as he was not deceived, misled nor injured, my opinion is, the court did right in refusing to quash the writ on that account.

The writ requires the party to appear before the judge of the circuit court, at the next term, to be holden at St. Louis on a certain day. It is supposed a command to appear before the judge of the circuit court in term time, at the place, and at the time of holding court, is no command to appear at the court. I do not so understand it. In this case there was no possible chance for the defendant to be deceived or misled about the matter. He has not been deprived of any legal advantage, and therefore his writ ought not to have been quashed. My opinion then is that there is no error in the record. The judgments in both cases are affirmed.

before the "circuit court" &c., to answer the "complaint" &c.

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1840.

Payne
vs.
Collier.

It is a sufficient compliance with the 8th sec. of the act regulating "Practise at law," (R. C. 1835, p. 451,) if the original writ requires the def't to appear before the "judge of the circuit court," &c., to answer the "demand," &c.; instead of, to appear

ELLETT V. BOBB.

When a person hires a slave for a certain time, and agrees to return the slave at the end of that time, and the slave, in the mean time, runs away, without the fault of the hirer, who has used due diligence to prevent the escape, and retake the slave, but without success, he will only be liable for the hire, and not for the return of the slave.

Error to the circuit court of St. Louis county.

Gamble for Plff in error.

The contract in this case *being expressly to pay the money and return the slave*, the obligor must perform his contract. Chitty on contracts 273. Comyn on landlord and tenant 113.

MAY TERM
1840

Ellett
vs.
Bob.

B. Allen for Def't in error.

It is insisted on part of def't. in error, that the demurrers were rightly overruled. Wheeler's law of slavery pages 152-3-4-5-9. Story on Bailments 225-250-9, 274. Boyce vs. Anderson 2 Peters Rep. 150. Chitty on con. 273. Story on Bail. 265, 263, 269, 273.

Opinion of the Court delivered by Tompkins Judge.

William R. Ellett brought his action against Charles M. Bob in the circuit court of St. Louis county, where judgment being given against him, he brings the case into this court to reverse the judgment.

Ellett, in his declaration, states, that the defendant, on the second day of January 1837, made his certain agreement in writing, by which he promised to "pay the plaintiff, on, or before the 25th day of December then next, the sum of one hundred and sixty five dollars and fifty cents, for the hire of a negro boy; and that the said defendant, by his said agreement, further promised the said plaintiff, that the said negro should be returned to the plaintiff on the said 25th day of December; and then the plaintiff assigns as a breach, that the defendant had not paid the said money, or any part thereof, and that he had not returned the said negro to the plaintiff.

To this declaration the defendant pleaded, that on the 5th day of May 1837, without any fault of the defendant, the said negro ran away, and did not return to the said defendant before the 25th day of December, or any time since, &c. and also, as to the breach of the said agreement in not paying to the plaintiff the said sum of money, that he did not undertake and promise, &c., and as to the breach of the agreement in not returning the said negro, that the negro ran away as in the first plea stated. To these special pleas the plaintiff demurred, and the court sustained the pleas demurred to.

On the part of the plaintiff it is contended, that when, by his own special agreement, the defendant undertakes to do an act, it is his own fault if he does not provide against contingencies. As in the case of an express contract to

repair generally, made by a tenant, he is bound to repair though the building be destroyed by fire.

MAY TERM
1840

On the part of the defendant in error it is contended that, this being a peculiar kind of property, the defendant should not be deemed to have covenanted to restore the negro in case, he ran away without the fault of the defendant. Story on Bailments is relied on, pages 152-3-4-5-9. To this opinion I incline. The defendant could not have the use of the negro without leaving him at liberty; and for the assurance of the negro's health and comfort, so much indulgence is necessary as to leave it in his power to escape, if he be so inclined. All that could reasonably be expected from the bailee of a slave is, that he will pay such attention to prevent escapes, and to retake one that has escaped, as a diligent master would use in case his own slave had made his escape; among other things necessary to be done by the bailee, would always, perhaps, be the duty of informing the bailor. But I am inclined to believe that good policy would require that, in all cases of slaves running away from the bailee, he ought to pay the hire, if the conduct of the bailor had been fair. Such is the opinion of every member of this court. The defendant then must in the opinion of this court pay the hire of the negro in this case. But a good plea in bar to the promise to return the negro on the 25th of December 1837, may be framed by making proper averments, as, that the negro ran away without his fault; that he used due diligence to prevent an escape, and to retake him; but the bailee could not be reasonably required to use the extreme diligence that the owner might be disposed to use, to retake a runaway; nor to encounter as great expense, in case the negro should succeed in escaping into a distant country.

Ellis
vs.
Bob

Where a person hires a slave for a certain time, and agrees to return the slave at the end of that time, and the slave, in the mean time, runs away, without the fault of the hirer, who has used due diligence to prevent the escape, and retake the slave but without success, he will only be liable for the hire, and not for the return of the slave.

The judgment of the circuit court must be reversed, and the cause remanded, for further proceedings in conformity to this opinion.

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105 449
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NEW TERM
1840.

Green & Yarnall adm'rs of
Yarnall
vs.
Yarnall.

GREEN & YARNALL adm'rs. of YARNALL dec'd v. YARNALL.

1. A deed only takes effect from its delivery: but the possession of the deed by the grantee, is presumptive evidence of a delivery.
2. In a doubtful state of facts, the acquiescence of an adverse claimant is entitled to great weight; but, otherwise where the facts are well established, and the parties seem to have been in a state of ignorance as to law.

Error to the circuit court of St. Charles county.

Bird for Plaintiff.

1. The plaintiff here insists that the court erred in instructing the jury on the evidence before them, that said deed passed no title to plaintiff, and the covenants in it did not stop the defendant from maintaining his action.

2 The court also erred in rejecting the evidence offered by defendant below. Revised Code of Missouri page 745, sections 31, 32, 33.

Gamble for Defendant.

1. That the paper offered as a deed of gift was rightly rejected. 2 Kent 354. Revised Code of Mo. 1825, page 745, sec. 31.

2. That the instruction given by the court was certainly not wrong; and I ask how this court can say that the evidence offered was of any sort of relevancy on the trial of the issue.

Opinion of the court delivered by Tompkins Judge.

The administrators of John Yarnall brought their action of detinue against John Yarnall, the plaintiff in error, in the circuit court of St. Charles county, and having obtained a judgment in that court, John Yarnall comes into this court, on his writ of error, to reverse the judgment of the circuit court.

On the trial of the cause the defendant offered in evidence a deed, in these words, viz: "Know all men by these presents that, I John Yarnall of &c., do give, grant, bargain and sell unto my son John Yarnall, a certain tract or parcel of land, lying and situate in the county of St. Charles, &c., and I do furthermore give, grant, bargain and sell, unto my son John, all my negroes as follows, Jack, Tom, Sam, &c., to him, and for his use, his heirs, executors and administrators forever. And I do, by these presents, bind myself,

my heirs, executors and administrators, to warrant and defend the above described premises and negroes, to my son John, and his heirs, executors and administrators forever, &c." This deed was dated the 21st day of November, in the year 1830, and recorded on 6th August 1831.

MAX YERN
1840.
Green & Yarnall adm'rs
of Yarnall,
vs.
Yarnall.

The plaintiff then produced Philo Gillet, a subscribing witness to the said deed, who testified that he wrote the deed, under the direction of the deceased, and subscribed it as a witness at his request; that John Yarnall, the defendant in the circuit court and plaintiff in error, was then under age, and was not present when the deed was drawn; that the deceased said, he should keep possession of the deed and the property until his death, and he knew of no delivery. The defendant then produced Robert Samuels as a witness, who testified, that a short time before the death of the maker of the deed, he, the witness, had a conversation with him, and advised him to give one of his negroes to his son in law Forman; that the deceased replied, that the negro was not his, he had given all his negroes, and the land where he lived, to his son John at his own death, and made him a deed therefor; he stated that John was a cripple; and he had enough property left to give his other children a start. The court decided that this deed could not be read to the jury, that it did not pass the property to the donee, and that the covenants of warranty in said deed, did not estop the administrators from maintaining their action. To this opinion the defendant excepted. The defendant then proved, that he remained a minor on the land, in the deed mentioned, until after the death of his father; that he took possession of the said negroes immediately after the death of his father; that one of the administrators of the deceased had, since the death of John Yarnall, hired some of the negroes from the defendant; that the widow of the deceased contracted with the defendant as the owner of said negroes; that the administrators had settled their accounts, and that more than three years had expired since they had taken out letters of administration; that all the debts had been paid, and that a balance due the estate had been distributed equally to the thirteen other children of the deceased, excluding the de-

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1846.
Green & Yar-
call adm'rs.
of Yarnall.
vs.
Yarnall.

defendant from any share in the distribution. This evidence was excluded by the court. The defendant then offered in evidence the inventory of the estate of the deceased, to show that the administrators had not considered the slaves as a part of the property of the deceased. This also the court decided to be no evidence against the claim of the administrators.

At the close of the bill of exceptions are found these words: "Philo Gillet testified, in addition to what is above stated, that he had heard a sister of the defendant say that, a short time before the death of her father, the defendant was attending him one day when the father fell asleep; that the defendant left the room; when he awoke he called for the defendant, who came; that the father said to John, have I not done enough for you to induce you to attend to me? I have made you a deed for the land and all the negroes; gave him the key of his bureau, and told John to go and get the deed and read it; the sister said whether John went and got the deed, or not, she did not take notice."

There is no evidence of the delivery of this deed to the defendant, by the father. The testimony of both the witnesses shows that the deceased never intended, when he made the deed, to deliver either the deed or the negroes, into the possession of his son in his life time, and a deed not delivered can not certainly pass any thing.

The witness introduced by the defendant himself testifies, that the deceased, in disclaiming any property in these negroes, stated that he had given the negroes and land to John at his death, and had made a deed. It is useless to enquire what might have been the intention of the deceased apart from the legal effect of this deed. We cannot resort to testimony to give any signification to the language of the deed, other than what the words themselves and the character of the instrument import. Even the hearsay evidence, of what the sister of the plaintiff in error said, amounts to nothing more than a permission to take the deed and read it, in order that he might know its contents. In general, it is pre-

A deed only takes effect from its delivery: but the possession of the deed by the grantee, is presumptive evidence of a delivery.

sumed that a deed is delivered when it is found in the possession of the person to whom it is made. But here enough has been proved to make it the duty of John Yarnall, plaintiff in error, to show that this deed was delivered.

But even if a delivery were proved, still the statute law intervenes and declares, that no gift of any slaves shall be good, or sufficient to pass any estate in such slaves, unless the same shall be by will duly proved and recorded, or by deed in writing to be proved by two witnesses at least, and acknowledged by the donor, and recorded in the district, [circuit] court, [in the county] where one of the parties live, within eight months after the date of such deed, or writing, or unless possession be delivered of such slaves.— See sections 31 and 32 of a law respecting slaves page 745 of the digest of 1825.

This deed was made on the first day of November 1830, and not recorded till the 6th day of August 1831.

The circuit court then, in my opinion, committed no error in excluding all this evidence from the jury. But, for the defendant, it is contended that the acquiescence of the administrators, and of the widow, for so long a time, in his right, ought to avail him something. In a doubtful state of facts the acquiescence of an adverse claimant ought to weigh much. But the facts are well established, and the parties seem to have been in a state of ignorance as to the law. It would be moreover unjust if the acquiescence of the administrators, and the widow, should be construed to the prejudice of the claims of the children of the deceased.

For the reasons above given, the judgment of the circuit court ought in my opinion to be affirmed.

McGirk Judge not prepared to concur in the foregoing opinion.

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1840.

Green & Yarnall adm'rs of
Yarnall.
vs.
Yarnall.

In a doubtful state of facts, the acquiescence of an adverse claimant is entitled to great weight; but, otherwise where the facts are well established, and the parties seem to have been in a state of ignorance as to the law:

MAY TERM
1840.

Gurno
vs.
A. & N. Janis
adm'rs of Janis.

GURNO v. A. & N. JANIS, adm'rs of Janis.

1. The certificate of the Recorder of land titles made in conformity with act of Congress of May 26, 1824, is evidence of the facts contained in such certificate.
2. Whenever the law requires an officer to give a certificate of the existence of any fact, such certificate is evidence of the fact contained therein.
3. The act of Congress of June 13, 1812, amounts to a statutory confirmation of the town or village lots, &c., in the respective towns and villages therein mentioned, to all persons who come within the provisions of the act; and the owners or claimants of such lots, &c., have only to show, whenever their rights or claims to such lots are in litigation, that their cases are embraced by said act. Tompkins Judge dissenting.
4. The rule of the common law, that the defendant, in an action of ejectment, may show an outstanding title in a third person to defeat the suit of the plaintiff, is not changed by our statute, regulating the action of ejectment.
5. Under the act of June 13, 1812, it is not necessary that the claimant should have inhabited &c. the lot claimed, at the time of the passage of that act; but inhabitation, &c. prior to 26th Dec. 1803, is sufficient to pass the title from the U. S. to the claimant, without any regard to the fact whether such inhabitation, &c. had continued up to the passage of the act.

Coulter for Pltff in error.

I contend that the court committed error in refusing the instructions.

The second instruction supposes a state of facts, if possible, still stronger against the plaintiffs, for it supposes the said Tousant Lebeau to have been the only person who so inhabited, cultivated, and possessed, the premises in question, prior to the 20th December, 1803.

The question then is, does this make a better title than the certificate of Recorder Hunt which is the only title shown by the plaintiff?

Story's laws page 1972.

Geyer for Pltff in error.

1. The certificate of the Recorder is not competent evidence. Revised code 1835, p. 234, 251. Story's laws U. S. vol. 3. p. 1972.

2. The act of Congress of 13th June 1812, confirmed the lot—leaving the courts to decide between conflicting claims: and a confirmation by the recorder of land titles could give

no better title. *Vassier v. Benton*, 1 Mo. R. 96. *Salle dit Lajoi* 3d do. 529. See also *Newman v. Studley* 5 vol. 12 Peters 454. 6 Cranch 128.

NAV TERM
1840.

Gurno

vs.

A. & N. Janis
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nis.

6. The instructions, prayed for by the defendant, ought to have been given. If the facts stated hypothetically be true, (and that was a question for the jury,) the act of 13th June 1812, *proprio vigore* is a grant to Toussant Labeau and his representatives, and no subsequent act of the grantor, or his agent, could divest that title. See authorities on 2d point.

4. The Recorder, by the act of 26th May, 1821, was to ascertain, by evidence, what lots had been confirmed; but he was not authorized to make a grant *de novo*—much less, could he divest the title which, for twelve years, had been vested in another.

5. The duty of the Recorder was to discriminate between the public and private lots, and when he ascertained that any lot was rightfully claimed, according to the act of 13th June 1812, he was to certify that it had been confirmed; but he could not decide between individual claimants, which this court has decided as a judicial question. *Vassier v. Benton*, 1 Mo. R. 296.

6. The evidence before the recorder, under the act of 1824, was *ex parte* and includes no one except the United States; the question between individual claimants is still to be decided by the courts, according to the evidence before them.

7. If the act of the Recorder be regarded as a grant to Janis, still the prior grant of 13th June 1812 will prevail.

8. If it be true that Labeau was the only person who inhabited, cultivated or possessed the lot in question, prior to 20th Dec. 1803. he and his representatives acquired a complete title on the 13th June 1812, by grant from the United States; and the Recorder could no more divest the title under that grant, than he could supersede a confirmation by the commissioners, or a patent deed of the United States. Act of 9th March, 1825, Rev. 234. Revised code pa. 251, sec. 8.

Campbell for Def'ts in error.

1st. The circuit court did not err in admitting the certifi-

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cate of confirmation of Theodore Hunt, Recorder of land titles, to Antoine Janis, dec. for the premises in controversy.

2d. The circuit court did not err in refusing to give the two instructions prayed for by the defendants.

3. The certificate of the Recorder in this case is evidence of title, conclusive against the United States, and prima facie evidence of title against all persons not having a better title. Mo. R. vol. 4, page 458. Story's laws of U. States vol. 2, page 1257. Vol. 3, page 1972. Morton vs. Blankenship, Mo. R. vol. 5 page 346. Mo. R. Vol. 1 page 296; do. vol. 2, page 529; do. 4, 458; do. 5. 236.

Opinion of the Court delivered by McGirk Judge.

Napton Judge not sitting.

The administrators of Janis brought an action of ejectment, in the circuit court of St. Charles county, for a lot of ground in the town of St. Charles. The defendant pleaded not guilty. On the trial of the cause the plaintiff had a verdict and judgment. The cause was brought to this court, the judgment was reversed, the cause remanded, and on the trial of the cause the plaintiffs again had judgment, to reverse which the cause is again brought here.

On the trial of the cause in the circuit court, the plaintiffs gave in evidence a certificate of Theodore Hunt, Recorder of land titles for the State of Missouri, confirming this lot of ground to Antoine Janis the intestate. The defendant objected to the giving this certificate in evidence; the objection was overruled, and the paper received and read to the jury.

Upon this evidence, after having proved the defendant in possession at the time of bringing the action, the plaintiff rested his case.

The defendant then gave evidence to show that, prior to the 20th December, 1803, one Toussant Lebeau possessed, inhabited, and cultivated the lot in question, and that he, the defendant, had a conveyance from a portion of Lebeau's heirs for their share of the lot, and that the right to the balance was yet in Lebeau's heirs.

After the evidence was closed, the defendant moved the court to instruct the jury: 1st, that if they find from the evidence that Toussant Lebeau inhabited, cultivated and possessed the lot in question, prior to the 20th of December,

1803, and that he was an inhabitant of the village of St. Charles on the 13th day of June, 1812, then the plaintiffs are not entitled to recover.

2d. That if the jury find from the evidence, that Lebeau was the only person who inhabited, cultivated, or possessed the lot in question, prior to the 20th of December, 1803, and that he continued to be an inhabitant of St. Charles until, and on, the 19th of June, 1812, the plaintiffs are not entitled to recover.

The circuit court refused both these instructions, which refusal is assigned here for error.

The plaintiff in error, also, assigns for error, the reception of the Recorder's certificate, made in pursuance of the act of Congress of May 26th, 1824.

When this case was before this court on a former occasion, I wrote the opinion of the court, and gave my own views of the act of Congress of June 13th, 1812, (2 vol. Story's L. U. S. p. 1257,) and also my views of the act of 26th of May, 1824, 3 vol. Story's laws U. S. p. 1972.)

The counsel for the plaintiff in error insists now, that the Recorder's certificate is no evidence of any confirmation to Janis. First, Because it is no copy of any book, or paper, belonging to the office of the Recorder of land titles, and therefore does not come within the act of the General Assembly of January 26th, 1835, Revised code p. 250. The 7th section of that act declares, that copies of confirmations had before the Board of Commissioners for the adjustment of land titles, or before the Recorder of land titles, &c., and certified by the Recorder, or other person having the lawful custody of the papers, &c., shall be evidence, &c. The objection taken by the counsel for the defendant is, that the certificate given in evidence is no copy of any confirmation, but is an original paper, and therefore is not within the law. To this Mr. Campbell, for the defendants in error, replies, that the paper is evidence as an original paper, the Recorder being required by the act of Congress of May 26th, 1824, to give a certificate of confirmation in each case of confirmation. I am of opinion this is correct legal reasoning, and that the rule of law is, that whenever the law requires an

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The certificate of the Recorder of land titles, made in conformity with act of Congress of May 26, 1824, is evidence of the facts contained in such certificate.

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Whenever
the law re-
quires an offi-
cer to give a
certificate of
the existence
of any fact,
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cate is evi-
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officer to give a certificate of the existence of any fact that the certificate so given is to be received in evidence of the existence of the fact.

There is then no error on this point.

The next point is, did the court err in refusing to give the instruction asked by the defendant? My opinion is, that on this point there is error.

The opinion in this case, heretofore delivered, established the legal value of the recorder's certificate, as evidence to sustain the action of ejectment on the part of the plaintiff.— But now the question is to be decided, what kind of title, on the part of the defendant, is sufficient to defeat the plaintiff's action, notwithstanding the certificate of the recorder.

By the act of the 13th of June 1812, it is enacted, by the 1st section thereof. (2 vol. Story L. U. 1257): "That the rights, titles, and claims to town or village lots, out lots, &c., in, adjoining to, and belonging to St. Charles, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns aforesaid, according to their several right or rights in common thereto: provided this act shall not effect any confirmation made by the board of commissioners for the adjustment of land claims," &c.

The act of
Congress of
June 12, 1812
amounts to a
statutory
confirmation
of the town or
village lots,
&c. in the re-
spective
towns and vil-
lages therein
mentioned,
to all persons
who come wi-
thin the pro-
visions of the
act; and the
owners or clai-
mants of such
lots &c. have
only to show,
whenever
their rights or

It was the opinion of this court in the case of Vassier vs. Benton, and in this case when it was up before, that the act of 1812 amounts to a statutory confirmation of the town lots in the respective villages of all those lots, and to all those persons who come within its description, and that the owners or claimants have nothing to do but to shew whenever their rights are disputed in courts of justice, that their cases are within the act.

The act of the General Assembly of Missouri, R. C. p. 231 sect. 1, declares, that the action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises. This declaration throws but little light on the subject. But the 2nd section declares, that the action may also be maintained in all cases, where the plaintiff claims the possession of the premises, against

any person not having a better title thereto, by virtue of an entry with the register of public lands, a pre-emption, a New Madrid location, and 4th, a confirmation made under the laws of the U. S. A.

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Now in all these cases the plaintiff may maintain his action of ejectment against any one who has not got a better title than his. But in every case where the defendant has a better title than his, the plaintiff cannot, as against that defendant, maintain his action. In this case the plaintiffs have, in my opinion, brought their case within the first part of the act of our legislature; they have produced a confirmation, made to them by virtue of the act of Congress of the 6th of May 1824. The defendant, however, shews that the same lot of land was confirmed to him, and third persons, by the act of Congress, of 13th June 1212, nearly 18 years before the plaintiffs confirmation took place. In this case the rule at law is the same as that in equity, which is, that he who is first in point of time, is best in right. According to this view of the laws, the defendant has a better title to the premises than the plaintiff, notwithstanding the plaintiff has the confirmation of the recorder. In this case, however, the defendant, Gurno, has only shewn that he has purchased two shares, of the heirs of Lebeau, and that as to the other shares as he has no title thereto; and as the plaintiffs have a confirmation of the whole to their intestate, as to the balance of the lot the plaintiffs insist they have a right to recover. This brings in question the doctrine whether the defendant can, to defeat the plaintiff, prove an outstanding title in a third person. My opinion is, that as to this rule of the common-law the statute of ejectments has made no alteration. Suppose a plaintiff on the trial, in any case, proves his title by a patent of any given date, and then the defendant will shew that one, or ten years before the plaintiff's right accrued, a patent was made to a third person for the same land. In such a case, it is quite clear, the defendant has no right to the property. But it is equally clear that the plaintiff has no right to recover, because, in such case, he has no title. Why should he then recover of the defendant because the defendant has none?

claims are in litigation, that their cases are embraced by said act. Tompkins Judge dissenting.

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The rule of the common law, that the defendant in an action of ejectment, may show an outstanding title in a third person to defeat the suit of the plaintiff, is not changed by our statute, regulating the action of ejectment.

Under the act of June 13, 1812, it is not necessary that the claimant should have inhabited &c., the lot claimed, at the time of the passage of that act; but inhabitation &c., prior to 20th Dec., 1803, is sufficient to pass the title from the U. S. to the claimant, without any regard to the fact, whether such inhabitation &c., had continued up to the passage of the act.

From this view of the subject I conclude that the defendant may, as at common law, shew outstanding title to defeat the plaintiff, and that he is entitled to the possession against all the world but the right owner. In this case, then, a part of the title seems to be in the defendant, and a part in the heirs of Toussant Lebeau.

Mr. Campbell, of counsel for the defendant in error, insists, that at the time the act of 13th June 1812, was passed, there should not only have been inhabitation, cultivation, or possession, on the part of any claimant, but that the same should have continued, and should have been in existence on the day of the passage of the confirming act of 13th June 1812.

I do not think this view of the law is correct. My opinion is, that in every case, where the person inhabited, cultivated, or possessed a lot prior to the 20th Dec., 1803, the act of 1812, passes the fee simple from the U. S. into such possessor, without any regard to the fact whether this possession, &c. had continued up to the date of the act. It may be, that in some instances lots so possessed were abandoned by the possessor. In every such case of abandonment the property would be annexed to the public domain. But in every case what facts constitute an abandonment is matter of law, and the facts are to be proved and not to be presumed.

In this case there is no proof of an abandonment as understood by the Spanish law.

The judgment of the court below is reversed, and the cause is remanded for a new trial.

Opinion of Tompkins Judge dissenting.

The spirit of the act of Congress of the 13th of June 1812, required, in my opinion, the claimants of town or village lots, &c., to apply to the recorder of land titles for the territory of Missouri, to ascertain as well that they were such persons as under that act were entitled to such lots, as to ascertain the particular lot to which each was entitled.—The object of all the laws, passed by Congress for the adjustment of land titles, was to separate private from public property. For this purpose, the board of commissioners,

established under the act of 1805, had been clothed with ample powers; and by the act of 13th June 1812, the recorder of land titles had succeeded to all the powers and duties of that board: See the case of Newman vs. Lawless decided at this term. To attain the objects which Congress had in view, it was no less necessary that each individual claimant should come in and make proof of his claim to a town or village lot, than it was for an inhabitant to come in and prove his title to a donation on account of habitation, cultivation, &c. The lands were required to be separated into public and private property, for the interest of the Treasury; and the town or village lots, claimed by private persons, were required to be ascertained, in order that it might be known what lots the President might under that act, appropriate to the use of the United States, and next, what would be left to each particular town or village for the use of schools. But because Congress did not declare in express terms that the claimants lots should come in and claim under the penalty of a forfeiture, it is contended that the claimants were remitted to the ordinary tribunals of the country, for the purpose of ascertaining the particular lots to which each individual might, by this bounty of Congress, be entitled. It will here be recollected that he who had a title good and sufficient, from France or Spain, stood in no need of the aid of this act.

No claimant of a tract of land, by right of settlement, could procure a confirmation, unless he made application: for, otherwise, his claim would not be separated from the public lands, and would be liable to be sold. But the town or village lots, being already ascertained by survey, could be, and were, reserved from sale. This constitutes the sole difference betwixt a confirmation of a town or village lot, and a confirmation of a tract of land on account of cultivation, habitation, &c.; and the interest of the United States, and the policy of the law, as much required the Recorder to ascertain the proprietor of each particular town or village lot as the proprietor of each particular tract of land claimed by virtue of cultivation, &c., and his powers and duties alike.

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extended to each. The act of the 26th of May, 1824, is supplementary to that of 1812. The Recorder was a different man, but he was the same officer, clothed with the same powers; and by the 3d section of the latter act, he was required to issue certificates of confirmation to all such as proved up their claims before him; and his certificates of confirmation are, in my opinion, conclusive evidence of property in the persons to whom they are issued. The judgment of the circuit court ought then in my opinion to be affirmed.

POCOCKE vs. BLOUNT.

1. The ninth section of the act concerning bonds and notes (R. c. 1835, p. 105.) was intended to embrace all negotiable paper, except such as is specified in the sixth, seventh and eighth sections of that act.
2. In a suit by the endorsee of a promissory note, (not being a negotiable note within the meaning of the 6th section of the act concerning bonds and notes, R. c. 1835, p. 105,) against the endorser, it is not necessary to prove a demand upon the maker, and notice to the endorser.
3. It does not seem necessary, in such a suit, that the insolvency of the maker should be proved by his taking the insolvent debtor's oath. That it was not in the power of the plaintiff, at any time, to have made the money due in the note, from the maker by suit, seems sufficient proof of insolvency; which is a mixed question of law and fact, and must be left to the determination of the jury, subject to the instructions of the court.

Error to the St. Louis Circuit Court.

Hamilton for Plaintiff.

1. The court erred in refusing the plaintiff's instructions.
2. The instructions given by the court were erroneous, for the reasons already stated demand and notice were not requisite under the statute, nor the declaration.
3. The court erred in overruling the plaintiff's motion for a new trial. The instructions refused should have been given, those given, being opposite in their character, as a consequence, should have been refused. 1 Esp. 302. 5 Mass. 170. 7 Wendell 165. 1 Sug. and Rawles 334. 17 Wendell 94-2. R. C. 105, sec. 9. 2 Breeze 46. 1 vol. Breeze's Repts. 23 and 231.

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The first question arising in the case as it now stands is: Is it necessary when the maker of a note, at the time of its maturity, is insolvent, that a demand should be made, and notice of non-payment given, to the endorser in order to charge him? 3rd Kent's Com. 110. Nicholson vs. Gonthil J. H. Blackstone's Rep. 609, cited in Baily on Bills, page 314 note 161. Esdaile vs. Sowerby, 11 East. Rep. 114.—Howe vs. Bowes 5 Taunton Rep. 30. Rhode vs. Procter 4 Barnwell and Cress 517. Jackson vs. Richards 2 Caines Rep. 343. French vs. Bank of Columbia 4 Cranch 141. Sandford vs. Dillaway 10 Mass Rep. 52. Buck vs. Cotton 2 Conn. Rep. 126. Juniatta Bank vs. Hall 16th Serg. and Rawle 157. Graton vs. Dallhein 6 Greenleaf 476. Hill vs. Martin 12 Martin's Louisiana Rep. 177. Hunter vs. Price, 1 Mo. Rep. 53 and following.

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Blount.*Opinion of the Court delivered by Napton Judge.*

Pococke, the assignee of a promissory note, sued Blount, the assignor, in assumpsit. The declaration contained two special counts, besides the common counts.

The first count avers, after setting forth the note, that a demand was made upon the maker and notice given of non-payment to the endorser; and that the maker, at the time the note became due, and at the commencement of this suit, was insolvent, so that a writ against him would have been unavailing.

The second special count avers demand, and notice of a refusal to pay, and that a suit was commenced, and judgment recovered for the amount of the note against the maker, at the July term of the St. Louis circuit court: (being the term next before the commencement of this suit;) that an execution was issued against the maker, but that in consequence of his having no property or effects, no part of the debt was made. To this declaration defendant plead the general issue.

The plaintiff then, with leave, filed an additional count, which, after setting forth the note, &c., without alledging demand and notice, avers that on the 4th day of June, 1835, when the said note became due and payable, the maker was

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insolvent and unable to pay the same, and that he continued thus insolvent and unable to pay, up to the time of commencing this suit, and that a writ would, consequently, have been unavailing. To this count, also, defendant plead the general issue.

On the trial of the issue, the plaintiff gave in evidence the following note: "\$400.00. Twelve months after date, I promise to pay J. E. Blount or order, the sum of four hundred dollars, for value rec'd with interest thereon at the rate of ten per cent per annum until paid. St. Louis, June 1st 1839. Tho. N. Harris."—"Pay Wm. H. Pococke—J. E. Blount."

A variety of testimony was then adduced on the part of both plaintiff and defendant, in relation to the question of insolvency, which does not become material in the view I shall take of this case. No evidence was given of a demand or notice. The plaintiff asked for the following instructions:

1. If the jury believe, from the evidence, that the defendant has not sustained any damage, and can sustain none, from the want of demand upon the said Thomas N. Harris, the maker, and notice of non payment, they will find for the plaintiff.

2, Should the jury believe, from the evidence, that Thomas N. Harris, the maker of the note, from the time of its maturity, and up to the commencement of this suit, was insolvent and unable to pay the same, so that a writ or suit against him, by the plaintiff for the amount thereof, would have been unavailing, they will find for the plaintiff; although there be no proof of a demand on him, or of notice of non payment to the defendant as endorser.

3. The jury will find for the plaintiff if they believe, from the evidence, that at no time from the maturity of this note till the commencement of this suit, he could by due course of law have collected this debt, or any part of it, out of property belonging to Harris.

These instructions were refused by the court, and the following were given:

If the jury shall be of opinion, that there was no presentment, or demand of payment, on the maker of the note in

question, or no notice of non-payment given by the plaintiff to the defendant, as endorser, they ought to find for the defendant; or, if the jury shall not be of opinion, from the evidence, that a suit would have been unavailing, if brought by the plaintiff against the maker of the note in question, when said note became due, they ought to find for the defendant; otherwise, the jury ought to find for the plaintiff.— Exceptions were duly taken to these instructions. The jury returned a verdict for the defendant, and plaintiff moved for a new trial on the following grounds: 1. Because the court misinstructed the jury: 2. Because the court erroneously refused the instructions prayed by plaintiff: 3 and 4. Because the verdict was against law and evidence. This motion was overruled and exceptions taken.

The only material question raised on this record, is whether in a suit by an endorsee of such a note as was here sued on, against the endorser, the endorsee must aver and prove a demand upon the maker, and a notice of his refusal to pay to the endorser, in order to hold him liable.

Under the mercantile law, which now forms a part of the common law, this question would present no difficulty. It is not only well settled, that such proof of demand and notice is necessary to charge the endorser, but it seems the prevailing opinion, that even the insolvency of the maker will not excuse the holder from making a demand and giving notice. Chancellor Kent, (2 *comm.* 110) says: "It is now settled in England, in France, and in this country, that neither the insolvency of the drawer, or drawee, or acceptor, or the fact that the drawer had absconded, does away with the necessity of a demand of payment, and notice to the drawee or endorser; nor does knowledge in the endorser, when he endorsed the paper, of the insolvency of the maker of the note, or drawee of the bill, do away the necessity of notice, in order to charge him."

The current of authorities on this point is unvaried and conclusive. Bayley on Bills 314, and cases there cited. The act of Feb. 4, 1835, contains all the provisions in our statute, relating to this subject. That act is obviously based upon the act of Feb. 10, 1825, containing some additional

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provisions. The act of 1825, on the subject of assignments, is, I believe, plain and easy to be understood, and the numerous decisions of the courts of Virginia, and Kentucky, on similar provisions in the statutes of those States, would form a safe guide to this court, for the settlement of any difficulties which might arise in the interpretation of that act. But the act of 1835, concerning bonds and notes, whilst it substantially adopts all the provisions of the act of 1825, concerning assignments, creates a new class of instruments, and contains certain provisions, in relation to negotiable paper generally, which seems calculated to throw much confusion, and uncertainty, over the whole subject. The sixth section provides, that "every promissory note for the payment of money, expressed on the face thereof to be for 'value received,' negotiable and payable 'without defalcation,' shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange."

The 7th section says: "The payees and endorsees of every negotiable note, payable to them or order, and the holder of every such note, payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and endorsers of them respectively, in like manner as in cases of inland bills of exchange, and not otherwise." The 8th section makes further provisions in relation to the same class of notes. Now it will be observed, that the seventh and eighth sections use words sufficiently general to embrace a large class of promissory notes, which do not come within the description of the sixth section, and declares the rules to govern the construction of those notes to be the same as in cases of inland bills of exchange. But if we give this broad construction to these sections, we must annul the provisions of the second, third, fourth, fifth and ninth sections, which contain substantially, and without any very material alterations, the act of 1825, concerning assignments. These last mentioned sections make several material alterations from the mercantile law regulating assignable paper, and, undoubtedly, were intended to comprise negotiable paper, as well as other bonds and notes; and the only class of

notes designed to be left unaffected by their provisions, were the instruments described in the 6th section.

If the word "*such*" were inserted in the seventh section, before the words "negotiable note," it would render that, and the subsequent section, what the general tenor of the statute would well justify, a mere extension of the provisions of the sixth section, and applicable only to *such* negotiable notes as were described in that section. Whether this was in fact a typographical error, will not now be considered, as it is not material that it should be in this case; but this court, in a previous case, (*The State v. Beasley*, 5 Mo. Rep. 93,) rejected a word, where it was obviously a typographical error, and I know of no reason why one could not be inserted, where the reasons were equally strong.

The ninth section provides, that the assignment of a bond or note, (other than a negotiable note, as defined by the sixth section,) may maintain an action against the assignor, upon failure to obtain payment from the obligor or maker, only in one of the following cases:

First, if he use due diligence in the institution and prosecution of a suit at law, against the obligor or maker, for the recovery of the money or property due, or damages in lieu thereof.

Second, If the obligor or maker is insolvent, or is not a resident of, or residing within, this State, so that a writ would be unavailing, or could not be instituted.

In looking at this section, in connexion with the other provisions of the act, it is worthy of observation, that:

If this section was not intended to include, and does not include, such notes as were at common law negotiable, excepting only such as were in the sixth section, then the sixth section is to all intents and purposes annulled; because the notes described in the sixth section would, in that event, be precisely on the same footing with all negotiable paper, and the section would have been useless. In addition to this, a consideration of the character, and condition, and feelings of the citizens, for whose benefit this law was enacted, is not without its use, in ascertaining the intent and object of the legislature. I think it is apparent, from all the features of

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this act, that the legislature desired to accommodate two classes of our citizens, who entertain very different views in relation to what is just in matters of this kind.

The sixth section was intended to meet the views and wishes of the mercantile interest—to give them a class of notes, which should be governed by the law merchant solely; and the other provisions of the statute, were designed to accommodate the larger portion of our community, consisting, chiefly, of agriculturists, and relieve them from the operation of those rules with which they were not familiar, and which they did not desire.

The ninth section of the act concerning bonds and notes (R. C. 1-35, p. 105,) was intended to embrace all negotiable paper, except such as is specified in the sixth, seventh and eighth sections of that act.

From these considerations I have concluded, that the ninth section of this act was intended to embrace all negotiable paper, except such as is specified in the sixth, seventh and eighth sections, and consequently applies to the note sued on in this case.

The proper construction of the ninth section presents, in my opinion, no difficulties. If we have conjectured rightly, in relation to the objects of this section, and the motives of its framers, it would be a very strange and unnatural interpretation, to presume that the legislature intended to impose additional burthens on the holder of this kind of paper.—The legislature declare, that in order to maintain an action against the endorser, the holder must use due diligence in the institution of a suit at law, against the maker. Can it be fairly inferred, that in addition to this suit, must be super-added a *demand* upon the maker, and a notice of such demand to the endorser? What can be a more solemn demand upon the maker than a suit? It is plain that the institution of a suit, and the common law demand and notice, were not required. The former was substituted for the latter, and stands in lieu of it.

The section then goes further, and declares what shall excuse the bringing of a suit, to wit: if the obligor is insolvent—making it obvious that the institution of a suit was substituted for the demand and notice, and the proof of insolvency, or absence from the state, was substituted, or admitted, in lieu of the institution of a suit.

The holder of the note, then, to maintain his action against

the endorser, must prove that he has used due diligence in the prosecution of a suit against the maker, or, he may excuse himself from bringing suit by proving that the maker was insolvent, and consequently, a writ would be unavailing and no demand or notice is, in either event, necessary.

This question disposes of this case, for the court instructed the jury, that demand and notice were necessary, and the jury might have found their verdict upon that instruction, and the entire absence of any testimony to prove those facts, without looking into the question of insolvency. But, as that question must ultimately be involved in the final disposition of this case, I will briefly state the views which I understood the court to entertain on that subject.

In Virginia, the rule on this subject, and recognized by the Supreme Court of the United States in *Violett v. Patton* (5 Cranch, 142,) was, that the jury were to determine, from the facts before them, whether a suit would have been unavailing, or not. Chief Justice Marshall, in delivering the opinion of the court in that case: "It is understood to be the law, that the maker must be sued if he is solvent: but his insolvency dispenses with the necessity of suing him. It is not known, that any decision of the state courts requires that the insolvency should be proved, by taking the oath of an insolvent debtor; nor is it believed that this is the only admissible testimony of the fact of insolvency.— Other testimony may be admitted. It would therefore have been proper to leave it to the jury to determine whether it was, at any time, in the power of the plaintiff to have made the money due on this note, or any part of it, from the maker by suit."

The Kentucky reports are full of cases on this subject, and it must be confessed that great strictness was required, and extreme diligence exacted by the courts of that State, under a law precisely the same as the Virginia law, and not very dissimilar from our own. (See the cases collated in 2 Peters R. p. 338, *Bank of U. S. v. Weiseger*.)

The rule recognized in *Violett v. Patton*, seems to be the most reasonable rule under our statute. It is a mixed ques-

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Pococke
vs.
Blount.

In a suit by the endorsee of a promissory note, (not being a negotiable note within the meaning of the 6th sect. of the act concerning bonds and notes, R. c. 1835, p. 105,) against the endorser, it is not necessary to prove a demand upon the maker, and notice to the endorser.

It does not seem necessary, in such a suit, that the insolvency of the maker

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should be proved by his taking the insolvent debtor's oath.

That it was not in the power of the plaintiff, at any time, to have made the money due in the note, from the maker by suit, seems sufficient proof of insolvency; which is a mixed question of law and fact, and must be left to the determination of the jury, subject to the instructions of the court.

tion of law and fact, and must be left to the determination of the jury, subject to the instructions of the court.

Whether the facts proved in this case were sufficient to warrant a finding of insolvency, it is not proper to enquire into, inasmuch as the verdict of the jury, having been found under an erroneous instruction of the court, ought to have been set aside. The judgment of the circuit court must be reversed and the cause remanded.

MICHAU vs. WALSH, adm'r. of WILCOX.

1. The term "lawful" in the 18th section of the act concerning "forcible entry and detainer," (R. C. 1835, p. 280,) seems to mean nothing more than peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so.
2. A lease does not, of itself, vest the possession of the premises leased, in the lessee, but only gives him a right of possession: and, if the lessee forcibly takes or detains possession, in the manner pointed out by the 2d section of the act concerning "forcible entry and detainer," he is guilty of a forcible entry and detainer, within the meaning of that act.
3. The defendant being convicted of the forcible entry and detainer, while the act of Feb. 6, 1837, was in force, the court properly, in addition to the writ of restitution, gave judgment for double rent for the premises, according to the provisions of that act. McGirk Judge, dissenting on this point.

Spalding and Tiffany for Plaintiff in error.

1. The court instructed the jury wrong.
2. The court refused to give proper instructions asked by appellant.
3. The court erred in taking testimony as to the rent, and in giving judgment therefor.
4. The court erred in refusing to grant a new trial. Rev. code, 277, 376. Act of Assembly of February 6, 1837, supplementary to "an act concerning forcible entries and detainers." Rev. code page 280, section 18.

Mullanphy for Defendant in error.

The only matter upon which plaintiff in error can hang

an objection, is the instructions of the circuit court given and refused. *Foster & Foster vs. Nowlin*, 4 Mo. Rep. 18. *Vaughan vs. Montgomery*, 5 Mo. Rep. 529. 2d. Black. com. 310, top paging. Sec. 2, act concerning forcible entries and detainers, Rev. Statutes of 1835. Act of Feb. 6, 1835.

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Michau
vs.
Walsh, ad'r.
of Wilcox.

Error to the St. Louis Circuit Court.

Opinion of the Court delivered by Napton Judge.

St. Amant Michau, in October 1837, brought an action of forcible entry and detainer, before Justice Elihu H. Shepard, against Horace Wilcox, and had judgment against him. The proceedings were, by writ of certiorari, taken up to the circuit court, and there being error in the same, in the opinion of that court, the judgment was reversed, and a new trial awarded. A verdict was again found against Wilcox, and judgment was given for a recovery of the possession, and for three hundred and ninety dollars, being the value of double the rent of the premises, from the time of the entry and detainer charged, and costs. Wilcox moved for a new trial, for reasons filed, which was overruled, and the case is brought here by writ of error.

The bill of exceptions details the following evidence. The premises in question had been in the actual possession of Michau for several years, and up to the time of the taking possession thereof by Wilcox. About 31st August, 1837, Wilcox, taking with him another person for witness, and with his furniture along in a dray, went to Michau's house, which was found closed, but was at length opened. Wilcox walked in, and said the house was his. Michau replied, that the house was not his, Wilcox's;—that Wilcox had defrauded him, Michau; that when Wilcox should comply with his agreement, pay him two thousand dollars, and become responsible for the debts on the property, as he had agreed to do, that then he might have the house. Thereupon, Wilcox took up his gun, said that was part of his furniture, that he had taken possession of the house, and would keep it. Michau then retired to the next room, brought out his gun, and said, that if that was the way he was to be forced out of his house, he knew how to defend his possession, or words to that effect. Wilcox retired from the house, and ordered his

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Michau
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of Wilcox.

dray back. Two or three days after this, Wilcox was seen in possession of the house, and Michau's property and furniture lying out. The manner of his getting possession was recounted by a witness. Whilst Michau and his family were out, the front door and windows being fast, the back window was raised, the house then entered, and the front door forced open from within, by means of a jack knife. The goods of Wilcox were then brought in, and the furniture of Michau carried out.

Defendant read in evidence: first, a deed assigning to Wilcox a lease from the city of St. Louis for the premises, acknowledged Aug. 23, 1837; and, second, the deed of lease so assigned.

The defendant moved the circuit court to instruct the jury: 1. That the lease made by Michau, and given in evidence, operated as a livery of seizen, and vested the defendant with the legal right to the possession of said premises. 2. That if the jury believed, defendant had got into the possession of said premises without doing violence, or forcing his entry with a strong hand, they ought to find for defendant. These instructions the court refused, but gave in lieu thereof the following: 1. That the instrument given in evidence, purporting to be a lease from the plaintiff to defendant did not, by itself, vest any possession of the premises in question in the defendant, but, at most, could give only a right, to be made available according to the forms and proceedings sanctioned by law. That in this case, there was no evidence, whatever, before the jury, of any delivery of possession, of the premises in question, having been made by the plaintiff to the defendant, but, on the contrary, that the evidence went to shew, that the plaintiff refused to give such possession to defendant. That if the jury should be of opinion in this case, that the defendant, without the consent of the plaintiff, entered upon said house, and took possession thereof, and held the same, they ought to find for the plaintiff; although they should be of opinion, from the evidence, that the plaintiff was not actually in the house, when such entry was effected; and that such entry was first effected, through a window open, or not secured, and afterwards con-

summated, by the forcible opening of the doors of said house from within.

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There was a motion for a new trial for various reasons, among which were, the finding of the court of double rent; which was considered excessive, and oppressive. This motion was overruled.

Michau
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of Wilcox.

The only errors, particularly insisted on in this court, are, that the circuit court gave improper instructions, refused to give correct ones, and gave the plaintiff unreasonable damages, in the form of double rent.

The second section of the statute of forcible entry and detainer, provides, that if any person shall enter upon or into any lands, tenements or other possessions, and detain and hold the same with force, or strong hand, or with weapons, or breaking open the doors or other part of a house, whether any person be in it or not, or by threatening to kill, maim, or beat the party in possession, or by such words or actions as have a natural tendency to excite fear or apprehension of danger or by putting out of doors, or carrying away the goods of the party in possession, or by entering peaceably, and then turning out by force, or frightening by threats, or other circumstances of terror, the party out of possession, in such case, every person so offending, shall be deemed guilty of a forcible entry and detainer, within the meaning of this act.

It will be perceived at once, that the terms of this section includes a great variety of cases, and, among others, the circumstances of the present case, as detailed in evidence; unless the meaning of this section be limited, in some degree, by some subsequent section. It is urged, that the 18th section is such a limitation, and that by taking the two sections together, a more reasonable and equitable construction may be given to the act, than by giving full force, and unqualified effect, to the distinct clauses of the first section.—The 18th section declares, that the “complainant shall not be compelled to make further proof of the forcible entry or detainer, than, that he was lawfully possessed of the premises, and that the defendant unlawfully entered into and detained the same.”

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The term "lawful," in the 18th sect. of the act concerning "forcible entry and detainer," (R. C. 1835, p. 280) seems to mean nothing more than peaceable or quiet possession, contradistinguished from possession which is not merely constructive, but actually so.

A lease does not, of itself, vest the possession of the premises leased, in the lessee, but only gives him a right of possession: and, if the lessee forcibly takes or detains possession, in the manner pointed out by the 2nd sect. of the act concerning "forcible entry and detainer," he is guilty of a forcible entry and detainer, within the meaning of that act.

In construing these two sections, if there be, as is supposed, any apparent or real inconsistency in their provisions, it appears to me reasonable, that the last being more general and indefinite, must be construed by reference to the first, which is specific and particular, and needs no construction. The term *lawful*, used in the 18th section, is not a very definite phrase, and, in common parlance, has a very different meaning from that which the strictness and accuracy of legal phraseology has annexed to it. I take it that nothing more is meant by the term *lawful*, in this section, than peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so. Such, I think, would be the character of the possession of the man, who, in my temporary absence, should get possession of my house. It would be tortious, and, on my return, I might eject him, without subjecting myself to an action of forcible entry and detainer. But such was not the nature of Michau's possession. At most, it could only be a constructive tortious possession, even admitting that, after he made the deed to Wilcox and received notice to quit, he was in the eye of the law, wrongfully in possession.

Under this view of the law, the construction claimed for the lease, by Wilcox's counsel in the circuit court, cannot be sustained. That court did not err in declaring, that the effect of it was only to give him a right of possession. The instructions which the court did give, appear to be, substantially, correct, and though the phraseology of the last instruction is liable to misinterpretation, it could scarcely have effected an injury to Wilcox, under the state of the testimony before the jury.

The supplementary act of 1837, (Sess. acts p. 63,) provides, that if any person be found guilty of a forcible entry and detainer, or of any unlawful detainer, the justice of the peace, or court before whom the same may be determined, shall, in addition to a writ of restitution, render judgment, that such person pay to the plaintiff double rent for the premises, from the time that the possession thereof was forcibly obtained, or unlawfully detained by the defendant, until the time of the redelivery of the premises to the plaintiff.—

The judgment in this case was in accordance with this provision, and the court ascertained from witnesses the monthly rent. It is contended, however, that this provision could not apply so the present case, because Wilcox had a deed from Michau, expressing on its face to be for a valuable consideration, and shewing conclusively, that Michau had no right of possession—which deed, it is supposed, at least, estops him from claiming any rent. It is to be observed, on this subject, that this deed forms no part of Michau's evidence on this action, or of Wilcox's defence, whatever remedy Wilcox may have had, or yet has, under his deed, can have no bearing on the present action.

The judgment of the circuit court is affirmed.

Opinion of McGirk Judge.

I concur in the first part of this opinion. But, I am of opinion, that part of the judgment which ascertains and gives double rent is erroneous, and ought to be reversed. provisions of that act. McGirk Judge, dissenting on this point.

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of Wilcox.

The defendant being convicted of the forcible entry and detainer, while the act of Feb. 6, 1837, was in force, the court properly, in addition to the writ of restitution, gave judgment for double rent for the premises, according to the

SOUTHACK vs. MORRIS.

The 4th section of the act relating to "Practice (Laws of Mo. session 1838-9, p. 99,) providing, that "all actions at law founded on bonds, bills, or notes, in the circuit court, shall be tried and determined at the return term, if the defendant shall have been personally served with process twenty days before the commencement of the term," does not apply to actions by "Petition in Debt."

Appeal from Circuit court of St. Louis county.

Hamilton for Appellant.

1. We rely upon the 4th section of the act to amend the practice acts, approved February 13, 1839, which provides, indiscriminately, and in emphatic and comprehensive terms, that *all actions* on bonds, bills, or notes, shall be tried at the return term, if there have been twenty days personal service. Practice act, article 3, sec. 1, R. C. 457.

2. The amendment must operate, at least as such, or it is a repeal of the petition and summons law.

Gamble for Appellee.

The only question which arises upon the record is, wheth-

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1840.

Southack
vs.
Morris.

er a summons, in an action commenced by petition, must be served twenty days before the return day. 4th sec. act of 13th February, 1839, entitled "an act to amend the acts regulating practice at law." 3d sec. 1 article of act regulating practice of law. 1st section of 3d article of same act. 2d section of 4th article of same act.

Opinion of the Court delivered by Napton Judge.

McGirk Judge giving no opinion, not having heard the argument.

Morris sued Southack, by petition in debt, on a promissory note made by Southack to Manny & Primrose, and endorsed to Morris. The writ was served on the 21st day of October, 1839, returnable to the third Monday in November, being the 18th.

The defendant pleaded to the action on the 18th November, and on the 28th November the action was called for trial. The defendant moved for a continuance; and, as appears from the bill of exceptions, objected to the trial of the cause at that term, because the personal service had not been twenty days before the trial. The motion was overruled, judgment given against defendant, and a motion made to set aside the verdict.

The defendant relies on the 4th section of the "act to amend the acts regulating practice at law," (acts of 1839, p. 99,) which provides, that "all actions at law, founded on bonds, bills or notes, in the circuit court, shall be tried and determined at the return term, if the defendant shall have been personally served with process twenty days before the commencement of the term, unless good cause for continuance be shewn."

The third section of the 1st article of the act to which this is an amendment, provides, that "every original writ shall be dated on the day it is issued, and shall be made returnable on the first day of the next term thereafter; but if the first day of such term be within fifteen days thereafter, then such writ shall be made returnable on the first day of the second term."

The act of 1839, it will be perceived, does not alter the time of service, but merely declares that certain actions shall

be tried at the first term, which before the passage of that act were continued as a matter of course.

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1840.

The act for the speedy recovery of debts due on bonds and notes, provides, that if there has been personal service, the defendant shall plead on or before the second day of the term at which he is bound to appear, and the suit shall be determined at that term, unless continued for good cause.

Southack
vs.
Morris.

And the last section of that act declares, that suits brought under it, except where it is otherwise provided in the act itself, shall be regulated by the general practice acts.

There being no change effected by the amendatory act of 1839, in the return term, it follows, that the provisions of that act do not apply to the time of pleading and trial under the petition law, because; that is otherwise provided for in that law. Any other construction would render the process of collecting debts under the "act for the speedy recovery of debts," &c., more dilatory than those conducted in the ordinary form.

The 4th sec. of the act relating to "Practice," (Laws of Mo. session 1838-9, p. 92) providing, that "all actions at law founded on bonds, bills or notes, in the circuit court, shall

Judgment affirmed with costs.

be tried and determined at the return term, if the defendant shall have been personally served with process twenty days before the commencement of the term," does not apply to actions by "Petition in Debt."

MOORE vs. THOMPSON.

In an action on a negotiable note by the payee against the maker, a plea in bar, which amounts to an averment or admission of fraud on the part of plaintiff, defendant, and a stranger, with a view to defeat the rights of the creditors of the latter, is bad, as tending an issue foreign to the case.

Error to Circuit Court of St. Louis county.

Allen and Polk for Plaintiff in Error.

That the said second plea of defendant is good in law, and the demurrer thereto ought to have been overruled by the court below. Perkins vs. Parker; 1 Mass. Rep. 117. Stevens vs. Gaylord, 11 do. 265. Hull vs. Blake, 13 do. 153. Foster vs. Jones, 15 do. 185. Attachment law, Rev. code, page 77, at the last clause of the 6th section, and at the 7th section:

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1840

Moore
vs.
Thompson.

Bowlin for Defendant in Error.

The only question that arises in this case is, did the court err in sustaining the demurrer to the plea? Chitty vol. 1, 551-2; 556-7; 572-3.

Opinion of the Court delivered by Napton Judge.

Thompson sued Moore by petition in debt, on a negotiable note, expressing on its face to be for value received, negotiable and payable without defalcation. Defendant plead, first, nil debit; second, a special plea, the substance of which is as follows: That the note sued on was given in consideration of money left by one Richard W. Carter, and that the said note was made, by the direction of said Carter, in the name of said Thompson, with the intent, by said Carter and Thompson, of secreting the said money and effects from the creditors of said Carter; before the said money became payable, according to the terms of said note, he, the said defendant, was summoned as garnishee, in an action in the said St. Louis circuit court, commenced by Samuel H. Peake against William C. Hull and Richard W. Carter; and was also summoned as garnishee, in an action, in the same court, brought by William Redmond against said Hull and Carter; all which writs were returnable to the July term of the same court; and the sums, in the said several writs demanded, exceeded the amount of the said promissory note: all which said several writs and actions were then pending in said court, undetermined.

To this second plea there was a demurrer, and the court rendered judgment for the plaintiff on the demurrer.

In an action on a negotiable note by the payee against the maker, a plea in bar, which amounts to an averment or admission of fraud on the part of plaintiff, defendant and a stranger, with a view to defeat the rights of

That fraud is a subject within the reach of a court of law, as completely and effectually as it could be reached in equity, is understood to be well settled. This plea, however, amounts to an admission, or averment of fraud, on the part of Carter, plaintiff, and defendant, with a view to defeat the rights of certain persons who were creditors of Carter. This plea, if issuable at all, would put in issue the existence of debts due by Carter, and the various rights which his creditors might have on his fund. This issue seems to be totally foreign to this case. Let the defendant in this case pay according to his contract, and the creditors of Carter have

their remedy, if they can establish the fraud alledged in this plea. The defendant deserves no special favor or protection, nor the plaintiff either, if the facts stated in this plea be true, but the truth of these averments is not properly triable in this suit. Judgment affirmed.

of the latter, is bad, as tending an issue foreign to the case.

MAY TERM.
1840.

Moore
vs
Thompson.
the creditors

LANGHAM to use of ORTLEY, vs. LEBARGE.

In a suit by petition in debt, brought by the payee of the note, to the use of the assignee, the plaintiff cannot amend by striking out the endorsements, with a view of showing himself the legal owner of the note, as the form of the action declares that he is not the legal owner of the note. (See Jeffries v. Oliver, 5 Mo. R. p. 433).

Hamilton for Plaintiff.

1. This action was well brought in the name of the payee, as nominal plaintiff, to the use of F. D. Ortley. Waggoner vs. Colvin, (11 Wendell 29.) 15 Johns. 247; 20 ib. 367; and 7 Cowen 176. 7 Greenleaf 28. 9 Mass. 423. 3 Greenleaf 73. 15 Mass. 534. 2 Breeze 227.

2. The payee and holder of a negotiable note, with an endorsement written thereon to a third person, can, without a re-assignment or receipt from the indorsee, maintain an action in his own name. 3 Wheat. 172. 3 Wash. 404. 1 Breeze 288, 289.

3. The plaintiff's motion to amend by striking out the endorsements, so as to remove the objection started by the court, should have been allowed.

Bent for Def't. in error.

It is submitted that the court did not err in overruling the motion to set aside the nonsuit. Decisions Sup. Court Mo. from 1837 to 1839. Jeffries v. Oliver to use of Bryans, page 33.

Error to St. Louis Circuit Court.

Opinion of the Court Delivered by Napton Judge.

This was an action brought by Langham, founded on a promissory note given to Langham by Lebarge, and by Langham directed to be paid to H. K. Ortley & Co., and by H. K. Ortley & Co. ordered, by indorsement, to be paid to

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1840.

F. D. Ortley. The suit was instituted in the name of Langham, the payee, to the use of Ortley, the holder.

Langham to
use of Ortley,
vs.

Lebargc.

In a suit by
petition in
debt, brought
by the payee
of the note,
to the use of
the assignee,
the plaintiff
cannot amend
by striking
out the en-
dorsements,
with a view of
showing himself
the legal owner of the note, as the form of the action declares, that
he is not the legal owner of the note. (See Jeffries v. Oliver, 5 Mo. R. p. 4 33)

The case of Jeffers v. Oliver, 5 Mo. Rep. 433, is exactly in point, and decides the only question arising in this case,

except that raised in the circuit court in relation to the right of the plaintiff, Langham, to strike out the endorsements,

and so regulate them as to show himself the holder. This, it is obvious, he could not do, for the form of his action declares that Langham is not the holder, or legal owner, of the note, but F. D. Ortley, to whose use the suit is brought.

There, was therefore, no error committed by the court, either in directing a non suit, or refusing leave for the plaintiff to amend. Judgment affirmed.

BRIDGEFORD, et al vs. STEAM BOAT ELK.

The affidavit required to be made to the complaint of the plaintiff, in a suit instituted under the act concerning "boats and vessels," (R. C. 1835, p. 103,) if not made by the plaintiff himself, should show what means the affiant had of knowing the truth of the particulars specified in the complaint.

Error to St. Louis circuit court.

Hamilton for Plaintiff.

1. By the sixth section of the supplement, it is provided, that in all suits of this kind, the court shall be governed by its ordinary rules of practice.

2. The judgment by default was regularly taken under the statute (R. C. 460, sec. 31,) the defendant having failed to plead; the memorandum, or entry, upon the law docket, being a nullity, and the merest evasion of the rule of court; it was a violation of the implied faith that a plea, such as would go to the merits, should be filed, the defendant having procured an extension of time for pleading.

3. No "good cause," within the meaning of the act, (R. C. 460, sec. 31,) was shown to the court for setting aside the default, or dismissing the suit; the affidavit being sufficient. 6 Eln. R. 249. 2 Russell on Crimes 518. R. C. 191, sec. 1. 11 Wendell 185.

*Bowlin for Appellee.*MAY TERM
1840.

1. That the affidavit verifies nothing *positive* or certain. It is not made by either of the parties, their agent, familiar with their business, or clerk; but, is made by an indifferent individual, and the affidavit seems to be framed to suit the circumstances of the case, without regard to the requisitions of the law.

2. That the affidavit sets forth nothing *explicit*, but deals in mere generalities, and, in the plain meaning of the language employed, it amounts to nothing more than a declaration on oath, that he knows and believes nothing to the contrary of its truth.

3. The affidavit sets forth no subsisting demand, to which there is a *positive* and *direct* swearing, as, by analogy to the attachment law, it should have done.

Opinion of the court delivered by Napton Judge.

The complaint of Bridgeford, Rickets & Co. against the steam boat Elk, was instituted according to the provisions of the act to provide for the collection of demands against boats and vessels.

The defendant, in the court below, before the time for pleading expired, filed a motion to quash, because of the insufficiency of the affidavit. Before the motion came on to be heard, plaintiff took judgment by default. The motion to quash was afterwards heard by the court, and the court set aside the judgment by default, and quashed.

The view which I entertain of the value of the affidavit, renders any opinion in relation to the regularity of the proceedings unnecessary. The affidavit annexed to the complaint, was in the following words: "James M. Buckley, being duly sworn, by me the subscriber, on his oath declareth and saith, that the above complaint is true, to the best of his knowledge and belief."

That the affiant could, on this affidavit, be convicted of perjury, if the facts stated in the complaint were untrue, I entertain no doubt. Commonwealth vs. Cornish, 6 Binn. R. 249. He could not protect himself under the pretence that he had no knowledge, and consequently no right to believe any thing about it. If a man undertakes to swear to

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Bridgeford et
al.
vs.
Steam boat
Elk.

The affidavit required to be made to the complaint of the plaintiff, in a suit instituted under the act concerning "boats and vessels," (R. C. 1835, p. 103,) if not made by the plaintiff himself should show what means the affiant had of knowing the truth of the particulars specified in the complaint

a matter of which he has no knowledge, he is perjured, although what he has sworn, turns out to be true. 3 Inst. 166.

But, I apprehend that true policy requires that something more than a liability to prosecution should be the test of the sufficiency of these affidavits. Mr. Chitty observes in relation to affidavits to hold to bail, to which the affidavit in this case may be regarded somewhat analogous, that, "the strictness required in these affidavits is not only to guard defendants against the consequences of perjury, but, also, those who make the affidavit against any misconception of the law." Chitty on bills, 348.

It is obvious, in this case, that the party who made the affidavit, not being party complaining, does not show what means he had of knowing the truth of any of the particulars specified in the complaint, whether he was clerk, book keeper, or agent, and coupled with the qualifying words at the end of his affidavit, may have been made under a great misconception of the construction which the law would put upon it. It is well, therefore, to guard against the possibility of misconception on this subject, and the defendant has rights which should not be jeopardized by such general, and apparently qualified, oaths.

The court did not err, then in quashing this complaint.— Judgment affirmed.

PILLARD v. Adm'rs. of DARST.

Suit by the assignee of a promissory note against the adm'r. of the assignor, on the ground of the insolvency of the maker: proof, that the visible property of the maker was not equal in value to the amount of his indebtedness, held, to be insufficient to establish the insolvency.

Error to St. Louis Circuit Court.

Bogy and Hunton for Plaintiffs in Error.

The only question for the adjudication of this court is, as to the liability of the defendants, under the assignment of the note by their intestate to the plaintiff: And, the decision of that question, must depend upon the construction to be given to the statute upon the subject of "assignments," pas-

sed Feb'y 11th 1825. See Revised Laws 1825, page, 143.—
See Breese's Reports, page 16, and Reports of cases in Illinois page 46.

MAY TERM
1840.

Primm for Defendants.

Pillard, vs.
administr's of
Darst.

1st. Did the assignee of that note "use due diligence in the institution and prosecution of a suit at law against the maker for the recovery of the money due, or damages in lieu thereof?" The defendants say no.

2nd. Was the maker insolvent, so that a writ would be unavailing? The defendants contend that the term insolvent, used by the statute, means that kind of insolvency which is evidenced by taking the benefit of the insolvent act, and not the mere fact, that a person's visible property is not equal in value to the amount of his known debts. Rev. L. 1825, p. 143.

The defendants call the attention of the court to the additional point, that there is no evidence of demand and notice of non-payment to the assignor. Such demand and notice, they contend, is necessary to charge the assignor. Irwin vs Maury 1 Mo. Rep. p. 194.

Opinion of the Court delivered by Napton Judge.

Pillard presented for allowance to the county court of St. Louis county, a demand against the estate of Darst, founded on a note made by one Philip Borgna to Darst, and assigned by Darst to him, (Pillard.) The note was as follows: "St. Louis June 2, 1834. One year from date, I promise to pay John Darst, or order, one hundred and eighty dollars, for value received; with interest at the rate of ten per cent per annum from date. Ph. Borgna. \$180,00." On the back of this note was the following endorsement: "For value received I assign the within note to Pierre Pillard—John Darst." "\$10 Paid on account by me. Ph. Borgna." The signature of Darst was proved. This claim was not allowed by the county court, and an appeal was taken to the circuit court, where judgment was again given against Pillard.

The bill of exceptions details the testimony offered, from which, it appears that the maker of the note was a Catholic priest, stationed at this place (St. Louis;) that he was possessed of no property, with the exception of a horse, saddle

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and bridle, and a few ecclesiastical books, the value of which was not stated. One witness stated, that Bognna, the maker of the note, had nothing in this country, except his gown and breviary; that he was to all appearances an insolvent man; that he left this country in a clandestine manner, sometime in the month of December in the year 1836, leaving debts behind without making any provision to pay them. That he has never returned, and left no property here. It further appeared, that the administrator of John Darst, some time in the early part of the year 1836, gave notice to the endorsee to bring suit against the maker, which was not done. It also appeared, that the endorsee had often called on the administrator of the estate for the payment, which was always refused.

This claim, as it appears from the record, was submitted to the circuit court, sitting as a jury, and the court found for the defendants.

The main question, argued in this case, is the same which this court has determined in the case of Pococke v. Bloynt, decided at this term.

Suit by the assignee of a promissory note against the adm'r of the assignor, on the ground of the insolvency of the maker: proof, that the visible property of the maker was not equal in value to amount of his known indebtedness, held, to be insufficient to establish the insolvency.

The only other question arising is, whether the verdict of the court is well supported by the facts in evidence. On this subject the rule has been often established by this court, that the evidence must greatly preponderate against the verdict to induce this court to direct a new trial. There is, in my opinion, no evidence of insolvency in this record. It would be quite easy to convict many very responsible persons of insolvency, if the want of any property, save a horse and some books, created an insolvency. No refusal by Borgna to pay any debt whatever was proved, and the want of due diligence by the holder was clearly established. The maker of this note continued in this country nearly eighteen months after it was due, and notwithstanding the administrators of the assignor notified the holder to bring suit, before Borgna had left the country, it was not done. The verdict of the court is well supported by the facts. Judgment affirmed.

LINDELL VS. BENTON & KENNERLY.

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100	602

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1840.

1. The act to incorporate the stockholders of the Bank of Missouri, (R. C. 1825, p. 164,) passed Jan. 30, 1817, continued in force until Feb. 1, 1838; and, during that time, the Bank had a legal existence for all the purposes contemplated by the act of incorporation.
2. In a writ of attachment, issued against a corporation, under the 8th section of the "act to regulate proceedings against corporations," (R. C. 1835, p. 126,) it is not necessary to mention the names of the garnishees: neither, is it necessary, that the sheriff should state in his return, that he had been directed, by the plaintiff or his attorney, to summon such garnishees.
3. Legal proceedings, regularly commenced against a corporation, are not affected by the expiration of the charter before the determination of such proceedings.
4. When an execution, regularly issued, has been returned unsatisfied, in whole or in part, another may be issued at any time thereafter, without resorting to a writ of scire facias to revive the judgment. (See Dowsman v. Potter, 1 Mo. R. p. 518.)

Lindell vs.
Benton &
Kennerly.

Error to the circuit court of St. Louis county.

Allen for Plaintiff.

On the reasons assigned on behalf of the garnishees in support of their motion, the plaintiff shows:

1. The record shows there was such a corporation, and the law recognizes it. Rev. Code of 1825, p. 164, 175. Its existence continued under the law till 1st February, 1838. id. 174, secs. 18, 30, 16. Angel and Ames on corporations, p. 406, 510.

2. The corporation, then, holding property, and being a creditor, the object of the issuing of the attachment is to reach this property, or debts due to it, which any creditor of the corporation may do. Rev. Code, of 1825, p. 224, sec. 5. Though trustees are appointed by the law, on the dissolution of the corporation, see id. to transact the business of the corporation, and authorized to sue, and liable to be sued, yet, there being already, at the dissolution of the corporation, a judgment against it, and the law providing for the issuing of this writ in cases where it holds property, or is a creditor, and this not being the commencement or prosecution of a suit, but the end of a suit, it seems to me to be competent, to any creditor of the corporation, to proceed in this way, otherwise liens may be lost, and the end of a long and protracted litigation be defeated.

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Kennerly

That the corporation has become extinct since the levy of the attachment, by limitation, cannot affect the right of the plaintiff herein. *Dorisman vs. Potter* 1 Mo. Rep. 518. Rev. Code of 1835, p. 126, sec. 8, 9.

Magenis and Blair for Defendants.

That by the common law on the extinction of a corporation the debts due to and from it are extinguished. *Angel and Ames* p. 513.

That the corporation of the B'k of Mo. had ceased to exist by non user, at the time of the service of the notice by which the said proceedings were begun, as appears by the record. *Munroe vs. Potomac co.* 8 Peters 287. J. R. vol. 19 p. 474-5. Sec. 8. Act on corporation Laws of Mo. 125 and 135.

The pl'ff in this case has not followed the law construction on either, and therefore the garnishees ought to have been discharged.

Again, if the proceedings were regular in the beginning, and the President, directors & co. of the Bank of Mo. properly sued in 1825, when in fact there were no such President, directors &c. even then, although it appeared by the statute that the said institution might exist till 1838, yet were not the proceedings had, subsequent to the last date, against the said President, directors, &c., as such President, directors, &c., absolutely void? *Tidd's practice* 1165. 17 Johns R. 271, *Johnson v. Parmely*. Sec. 11, R. C. p. 128. R. C. p. 77, sec. 7.

The execution was irregular and void, for the same reasons which avoided the original writ, and the whole proceedings: to wit, making the Pres't. &c. of the Bank of Mo., a party thereto, when there were no Pres't. &c., Bank of Mo.; or if not void ob initio, the proceedings under it were irregular from and after the date 1st Feb. 1838, when the charter expired, after which time, all debtors and creditors of that institution, if it had continued to operate regularly down to that time, would have become debtors and creditors to the trustees provided by law to administer its affairs. 9th section of the "act to regulate proceedings against corporations" passed, 6th February 1835.

It is contended, that if the defendants do not come, or are not shown by the proceedings to come within the terms of any one of those provisos, they were not legally summoned as garnishees, and therefore, the court below was right in discharging them.

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First. They are not, nor is either of them, named in the writ.

Secondly. The sheriff does not state in his return, that he found them in possession of any goods, moneys, or effects of the defendants.

Thirdly. It does not any where appear, that the defendants were directed to be summoned by the *plaintiff, or his attorney, as garnishees, and this ought to appear.* Maulsby and Maulsby vs. George Farr, 2d and 3rd vol. Mo. Rep. p. 438. Ridgway vs. Farr, same vol. 440.

Opinion of the Court delivered by Tompkins Judge.

This is a proceeding, instituted in the circuit court of St. Louis county, by Lindell against the president, directors and company of the Bank of Missouri. The plaintiff, Lindell, obtained a judgment against the Bank, but not being able to make the money on execution, he caused an attachment to be issued on the 18th day of July, in the year 1837, which was returned, "executed by summoning Thomas H. Benton and George H. Kennerly, as garnishees, to answer such interrogatories as might be exhibited against them by the plaintiff, touching their indebtedness to the president, directors and company of the Bank, defendants in the writ of attachment. The garnishees moved to be discharged: Because, 1st, At this date there is no such corporation existing as the president, directors, &c., of the Bank of Missouri, the charter thereof having expired, according to the original act of incorporation. 2d, Neither in the said writ of attachment, nor in the execution, nor in the præcipe, ordering the same, are the names of the garnishees, or of either of them, mentioned; nor has the sheriff shown, by his return, that there was any property of the defendants in the hands of the garnishees, or of either of them. 3. The execution issued in this case is irregular and void.

The act to incorporate the stockholders of the Bank of Mo. (R. C. 1835, p. 164,) passed Jan. 31, 1817, continued in force until 1 Feb. 1838, and during that time, the B^k had a legal existence for all the purposes contemplated by the act of incor'n.

1st. The act to incorporate the stockholders of the Bank

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of Missouri, passed the 31st of January, 1817, continued in force till the 1st day of February, 1838. This writ was issued on the 18th day of July, 1837, when the Bank had a legal existence for the purpose of holding property, and any of its property, or of the debts due the Bank, attached at that time, will be liable to be disposed of on the authority of that writ, if it were duly issued.

2d. Was this attachment duly issued?

The 8th section of the act to regulate proceedings against corporations, (p. 126 of the digest of 1835,) directs, that "in case the sheriff, or other officer, shall return upon any writ of fieri facias, that no goods and chattels, lands and tenements, can be found whereon to levy, &c., it shall be the duty of the circuit court, on the application of the plaintiff or his attorney, to issue a writ of attachment against the rights and creditors of the corporation, reciting the judgment, execution and return, and directed to the sheriff of the county." The ninth section declares, that, "such attachment shall be executed by summoning, as garnishee, any person having moneys, or effects, belonging to such corporation, and any debtor to such corporation who may be found in his county, to appear before the circuit court at the return of the writ, and then and there answer, touching any moneys or effects of such corporation in his hands, or any debt he may owe to the same;" and the tenth section provides, that "from the time of making such service, all moneys and effects due and owing, payable or belonging to such corporation, shall be bound until the judgment is satisfied."

A writ of fieri facias had been returned by the sheriff, and, from that return, it appeared that no property was found belonging to the bank; and this writ of fieri facias was recited in the writ of attachment. But by the 11th section of the same act, it is declared, that proceedings against garnishees, under this act, shall be the same as against absent and absconding debtors; and it is, therefore, contended, that a debtor of the Bank could not be summoned, unless he were either named in the writ, or directed to be summoned by the plaintiff, or his attorney. Because, it is said, that under the

provisions of the 7th section of the act to provide for the recovery of debts by attachment, (p. 77 of the digest of 1835,) none could be summoned but such as were either named in the writ, found in the possession of goods, &c. not actually seized by the officer, or such as were directed to be summoned by the plaintiff, or his attorney. If such were the law of the section last above cited, still it has, in my opinion, no application to the case; for the direction of the eleventh section relates to such proceedings as may be had against garnishees, after they have been made such by being summoned to appear in court. But by this seventh section of the act to provide for the recovery of debts by attachment, it is expressly provided, that the officer may summon debtors, and it is not required that the names of such debtors shall be either inserted in the writ, or that they shall be given to the officer, either by the plaintiff or his attorney. The section reads thus: "all persons shall be summoned as garnishees, who are named as such in the writ, and such others as the officer shall find in the possession of goods, money or effects of the defendant, not actually seized by the officer, and debtors of the defendant, and also such as the plaintiff or his attorney shall direct." The writ of attachment, it has been shown, recites the execution; it shews that no goods of the Bank were to be found; under this writ; the summons, as has also been shown, was regularly served on the defendants, as debtors of the Bank, on the 18th day of July, 1837; the charter of the Bank did not expire till 1st day of February, 1838, six months after the defendants were summoned as garnishees; and it is provided, by the 10th section of the act to regulate proceedings against corporations, that, from the time of making such service, all moneys and effects due and owing, payable or belonging, to such corporation, shall be bound until such judgment is satisfied; and no payment made thereafter to such corporation, or other disposition of such debts, &c. so attached, shall be credited to the garnishee making the same.

The corporation then having a legal existence, at the time the defendants in the attachment were summoned, it does not affect the rights of Lindell, that its charter had expired

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Kennerly.

In a writ of attachment, issued against a corporation, under the 8th section of the "act to regulate proceedings against corporations" (R. C. 1835, p. 126,) it is not necessary to mention the names of the garnishees; neither, is it necessary, that the sheriff should state in his return, that he had been directed by the plaintiff or his attorney, to summon such garnishees.

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1840.

Lindell vs.
Benton &
Kennerly.

Legal proceedings, regularly commenced against a corporation, are not affected by the expiration of the charter before the determination of such proceedings.

When an execution, regularly issued, has been returned unsatisfied, in whole or in part, another may be issued at any time thereafter, without resorting to a writ of scire facias to revive the judgment. (See Dowsman v. Potter 1 Mo. R. p. 518.)

when the circuit court was moved to discharge them. But it has been shown, that it is not necessary that the defendants should either have been named in the writ of attachment, or that it should appear by the sheriff's return, that he had been directed by the plaintiff, or his attorney, to summon them: it remains then, only, to enquire whether the execution issued was irregular and void, as was thirdly charged by the counsel for the defendants.

The record shows that, in less than one year after the judgment was rendered against the Bank, an execution was issued and returned not satisfied, no property being found. The case of Dowsman vs. Potter, 1st volume of Missouri decisions, shows that in such case another execution may be issued at any time thereafter, without resorting to the writ of sci. fa. The court there declared, that they could see no use in having the continuances of the executions entered, according to the practice of the English courts, saying, it is a mere form, and that they were opposed to adopting fictions unless some good end can be answered thereby. This being the only objection to the execution, which preceded the attachment, and, immediately after the return of which the order for issuing the attachment was made, it is my opinion that this execution was not irregular and void, as the defendants counsel have supposed, in their third reason for discharging them from the attachment.

The circuit court, then, in my opinion, committed error in sustaining the motion for discharging the defendants from this attachment, and its judgment ought to be reversed, and Judge Napton concurring, it is reversed.

MCGUNNEGLE VS THE STATE.

MAY TERM
1840.

1. The act of Feb. 6, 1837, (Laws of Mo. session 1836-7, p. 70,) for summoning petit jurors for St. Louis county, is cumulative.
2. The 4th sect of the act incorporating the "central fire company," of St. Louis, (Laws of Mo. session 1836-7, p. 172,) exempting the "active and efficient" members of that corporation from serving on juries, is neither unconstitutional, nor, in this instance, repugnant to the general policy of the law.

McGunnegle
VS
The State.*Geyer for Plaintiff.*

1. That the act concerning petit jurors, which was read in evidence, is the only authority for summoning petit jurors in the circuit court in St. Louis county.

2. That the failure of the county court to execute that act, does not suspend its operation, and subject the citizens of the county to the discretion of the circuit court.

3. The plaintiff in error not being required to serve, by the authority of any law in force in St. Louis county, could not, lawfully, be compelled to serve.

4. The plaintiff being an acting and efficient member of the central fire company, and, as such, exempt from service upon any jury, he ought, therefore, to have been discharged, on claiming his exemption. Act concerning petit jurors, approved, Feb'y. 6, 1837. Act to incorporate the central fire company of St. Louis.

Bent, Circuit Attorney, for the State.

It is provided by the Constitution of the United States, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Constitution U. S. amendments article 7.

It is also provided by the Constitution of the State of Missouri, (Article 13, sec. 8,) that the right of trial by jury shall remain inviolate.

Now it will be seen, that if the county court has neglected to make a list of jurors, pursuant to the law above referred to by the plaintiff in error, and there remained no other mode of procuring jurors, the above provisions of the constitution, above quoted, would be entirely nugatory.

Now it is contended, by the defendant in error, that in the last mentioned decision there is no error: Because, 1st. It is

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well settled constitutional law, that Legislatures cannot enact a law which would defeat the provisions of the constitution, either indirectly or directly.

If the Legislature have power to exempt one society, or body of people, from serving as jurors, they have power to exempt *ad infinitum*.

It might further be asked: Does the first law, above referred to, exempt all persons, not listed as thereby required, from serving on juries before justices of the peace on trials for assaults and batteries, and in cases of forcible entry and detainer?

If they are so excepted, and the terms of the law, if those laws are to be enforced, seem to contemplate that they are, we must advert to "an act concerning jurors," approved Feb. 13th, 1839, page 76, sec. 3, which provides, that "no person shall be required to serve on more than six juries in one year," and then enquire how all these laws can be enforced in *St. Louis county*, and yet juries be procured? Laws of Missouri 1838-9, p. 76. A law impossible to be enforced is null.

Opinion of the Court delivered by McGirk Judge.

At the February term of the circuit court for *St. Louis county*, George K. McGunnegle was summoned by the sheriff to serve as a petit juror, who refused to serve, and for so refusing the court imposed on him a fine of five dollars. To reverse that judgment, imposing the fine, McGunnegle has brought his cause to this court.

It appears, by a bill of exceptions, that McGunnegle, in excuse for not serving on the jury, relied and insisted, before that court, for exemption, on an act of the Legislature, passed the 6th day of Feb'y 1837. The act will be found in page 70 of the acts of 1837, by which, it is provided: "that it shall be the duty of the county court of *St. Louis county*, to keep a list of persons subject to serve as petit jurors in said county, and to furnish the sheriff of said county, at least ten days prior to the sitting of the circuit court, with the names of forty eight suitable persons on said list, to serve as jurors, at the approaching term of the circuit court; and that the 12 first on the list, shall serve the first week; the

next 12 shall serve the second week, and so on till the list is gone through." The act provides, that no one shall be required to serve on more than six juries in one year, and the persons so serving, shall not be required again to serve till all qualified have served. The act then provides, that the circuit court may, as often as it may be necessary, order an additional number of jurors to attend said court; and that all jurors shall receive out of the county treasury for serving, one dollar per day.

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McGunnegle
vs.
The State.

It appears also, that the county court has hitherto failed, by neglect or refusal, to execute the act; and that the circuit court has only the ordinary means left and provided by law for every county, of obtaining juries, and that, in this way, McGunnegle was regularly called on to serve on the jury. The question submitted by the record, by the counsel for the plaintiff in error, is, that no person in St. Louis county, can be lawfully required to serve on a jury, in any other way, than as required by the act of 6th Feb. 1837; and that, therefore, the court erred in imposing a fine on the plaintiff.

To this Mr. Bent, for the State, replies, that for the circuit court to proceed in business without a jury, would be unconstitutional; and that if no mode existed by law of obtaining a jury, yet it would be the duty of the court to provide its own mode, so as to enforce the constitutional provision, which is, "that the trial by jury shall remain inviolate."

My opinion is, that in the absence of all law, as to the means of the obtaining juries, the business of the circuit court would cease till the law making power should redress the evil, and the responsibility would fall on the legislature.

But, in this case, there exists no such state of things. The act of 6th Feb'y. is only accumulative; it contains no negative nor repealing clauses. Why the county court has not executed the law, is not a subject for present investigation. It may be a subject for the exercise of the authority of the circuit court, under its constitutional power to control inferior tribunals. There is nothing in this point, to entitle the plaintiff in error to a reversal of the fine.

The act of
Feb. 6, 1837,
(Laws of Mo-
sess. 1836-7,
p. 70,) for
summoning
petit jurors
for St. Louis
county, is cu-
mulative.

It appears by the record, that McGunnegle is, and was, a member of the St. Louis Central Fire Company, at the time

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The State.

he was required to serve on the jury; and that by the charter of the said company, it is declared, that the members of the company are, and shall be exempt from serving on juries. McGunnegle showed to the court, that he was a member of the Fire Company, as stated above, and on that account claimed exemption from serving as a juror; the court over ruled the claim of exemption, which is excepted to; and this matter is alledged as error. It is alledged, by the counsel for the State, that the exemption given here is against the genius of the government; and, therefore, void as unconstitutional. It is admitted, that exemptions, and monopolies, are to say the least of them, odious, and sometimes justly so.

The 4th sec. of the act incorporating the "central fire company," of St. Louis, (Laws of Mo. session 1836-7, p. 172,) exempting the "active and efficient" members of that corporation from serving on juries, is neither unconstitutional, nor, in this instance repugnant to the general policy of the law.

But it seems to me, that exemptions are sometimes exceedingly proper. It is, as a general proposition, true, that every citizen ought to bear an equal and just share of the burdens and duties of the government. But who can so properly judge of the just and equal distribution of these duties, as the Legislature of the country? It seems to me, that the Legislature have the power, and that it is their duty to do so; and if they should sometimes be mistaken, it does not follow, that the distribution is, for that reason, void.—

In this case, the duties of a member of the Fire Company, upon an inspection of the charter, will be found to be equal, if not greater, in all probability, one year with another than that of a juror. If then McGunnegle undertook those duties, which involve a risque of life very often, it seems but right that other citizens, who are not engaged in discharging these duties, should perform his share of the duties of a juror. Hence, I see nothing either unlawful, unconstitutional, or unjust in the exemption. Therefore the court in imposing the fine, and giving judgment in that case, erred.—The whole court being of the same opinion, the same is reversed.

ERSKINE & GORE V. STEAM BOAT THAMES.

MAY TERM
1840.

1. Not guilty, is not a good plea to a complaint, founded upon contract, filed against a steam boat, under the act concerning "boats and vessels." The plea must correspond with the nature of the complaint.
2. Where the complaint is founded upon the non-performance of a contract of affreightment, for the delivery of goods, the plaintiff need not aver, in his complaint, a demand for the delivery of the goods.
3. The carrier is bound to give notice of the arrival of the goods to the persons, to whom they are directed, if they are known to him, and within a reasonable time. Having done this, he would have performed his duty on his contract, by delivering the goods to such person on the bank of the river, at the usual place of delivery.

Erskine and
Gore
vs.
Steam boat
Thames.

Error to the Circuit Court of St. Louis County.

Polk for Plaintiff.

It is contended by the appellants counsel, that the court below erred, first, in not sustaining the plaintiffs demurrer to the defendants first plea. Second. In over ruling the plaintiffs demurrer, on the ground of the defectiveness of the complaint of the plaintiffs. 1 Chit. Plead. 552 side paging. 1 Chit. pl. 362. 1 Saund. 33 a note 2. 1 Chit. plead. 363 side paging and 2 New. Rep. 355. Gould's pleading, page 176. chap. 4, sect. 15. Story's Bailment page 344, sect's 540, 543 and 545.

King and Tunstall for Defendant.

The defendant in error contends, that the circuit court did not err in over ruling said demurrer; that said complaint is not sufficient in law, to enable the plaintiffs in error to have and maintain their aforesaid action.

That the said complaint is defective in this, that it is nowhere averred, in said complaint, that a demand was made on the defendant in error for the delivery of said goods in the port of St. Louis, by the plaintiffs in error, or by any other person authorized, and a refusal on the part of the defendant; and that, without such an averment, the said complaint is bad in law; and that the said complaint is otherwise defective, and not in compliance with the said statute of Missouri.

Opinion of the Court delivered by Tompkins Judge.

Erskine and Gore sued the steam boat Thames in the circuit court. Judgment, in that court, was rendered in favor

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1840.

Erskine and
Gore
vs
Steam boat
Thames.

Not guilty,
is not a good
plea to a com-
plaint, found-
ed upon con-
tract, filed a-
gainst a steam
boat, under
the act con-
cerning
"boats and
vessels." The
plea must cor-
respond with
the nature of
the complaint

of the steam boat; and Erskine and Gore prosecute this writ of error, in order to reverse that judgment.

The complaint set forth, that the complainants had a demand against the steam boat Thames; that on the 6th day of May 1839, certain goods were shipped on board of the said steam boat, which were to be delivered, without delay, (the dangers of the river navigation, and fire, excepted,) to the plaintiffs at the port of St. Louis Missouri, they paying freight, &c.: and, that neither the said goods, nor any part thereof, had been delivered to the plaintiffs. To this complaint, the steam boat Thames, by its attorney, pleaded not guilty, and the plaintiffs demurred specially to the plea, assigning for cause, that the complaint is founded on a contract, and that the plea sounds in tort. The action in this case is certainly founded on the contract, and the authorities are, that the plea of not guilty, to a declaration in assumpsit, is bad on demurrer, but would be aided by verdict. Sec. 1st, Chit. p. 511, note s., and authorities cited.

But it is contended, that the complaint, or declaration, is bad, in not averring a demand of the goods. The plaintiffs rely on the 540th, 543rd and 545th sections of Story's Commentaries, to prove, that, when a carrier undertakes to deliver the goods to the owner, he is chargeable for any loss before such delivery, although in all respects, he has followed the general custom of the place. The commentator says: "A question often arises in practice, whether the carrier is bound to make a personal delivery of the goods to the owner, or not. This may admit of different answers, according to circumstances. The manner of delivering the goods, and consequently the period, at which the responsibility of the carrier will cease, may in many instances, depend upon a special contract between the parties. If there is any special contract between the parties, or any local custom or usage of trade on the subject, that will govern; the former as an express, the latter as an implied term in the contract.

Where the
complaint is
founded upon
the non-per-
formance of a
contract of

But in the absence of any special contract, or custom, or usage, probably no general rule can be laid down. However this may be, it seems clear, that carriers are bound to give notice of the arrival of goods to the persons, to whom

they are directed, if they are known to them, and within a reasonable time; they must take care, at their peril, that the goods are delivered to the right person; for, otherwise, they will become responsible." The contract in this case, was to deliver to the plaintiffs, or to their assigns, at the port of St. Louis. The rule last above mentioned, viz: the carrier ought to give notice of the arrival of the goods, is what ought, in my opinion, to govern this case. The plaintiffs could not reasonably be expected to wait at the port, for perhaps a week or more, in expectation of the arrival of the goods. Yet it would be their duty, to be either themselves in the neighborhood, or to have an agent near, so that the carrier, by using a reasonable degree of diligence, might find out some person authorized to receive the goods. Having done this, he would have done his duty on this contract, by delivering the goods to such person, on the bank of the river, at the usual place of delivery. The complaint, or declaration, of the plaintiffs, appears to me have been well framed. The defendant might have pleaded, if it were true, that he was ready to deliver, and made diligent enquiry, &c., or any other matter in bar which would have been a good plea.

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Thames.

affreightment
for the deliv-
ery of goods,
the plaintiff
need not aver
in his com-
plaint a de-
mand for the
delivery of
the goods.

The carrier is bound to give notice of the arrival of the goods to the persons, to whom they are directed, if they are known to him, and within a reasonable time. Having done this, he would have performed his duty on his contract, by delivering the goods to such person on the bank of the river, at the usual place of delivery.

The circuit court, in my opinion, committed error in deciding, that the plaintiffs should have averred a demand in their complaint or declaration, and its judgment for that reason, ought, in my opinion, to be reversed, and such being so the opinion of others members of this court, it is reversed.

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PERPETUAL INSURANCE CO. VS. STEAMBOAT DETROIT.

A complaint filed against a Steam Boat, under the act concerning "boats and vessels," for mal-performance of a contract of affreightment for the delivery of goods, should set forth the proper parties; state, with whom the contract was made; the terms of the contract; when it was entered into; the quantity of goods delivered; and should also show, that the suit was commenced within six months after the cause of action commenced; otherwise, the complaint does not "set forth the plaintiff's demand in *all its particulars*," as required by the 4th section of the above act.

King and Tunstall for plaintiffs in error.

The circuit court, in this case, committed error in this, to wit: First, that the plaintiff's complaint is in pursuance of the statute authorizing such proceedings against boats and vessels. Missouri digest, page 102, &c.

2d. That upon the first discovery of the loss of the goods the owner thereof insured had a right to abandon to the insurer, the plaintiffs in error, and did so abandon. See Hughes on Insurance, pages at top 324 and 325. Also 2d vol. Peters' Digest, page 513, at bottom.

3d. That the owners of the goods could not abandon until the vessel arrived in port, for, until then, they could not tell what goods were missing, or whether they had a right to abandon, and if they did abandon they must do so for the whole subject of insurance, and not for a part, otherwise there would be no abandonment. Hughes on Insurance, page top 325.

4. And that when an abandonment is made, the underwriters, the insurers, stand, from that time, in the same situation as the owners did as relates to the shipper; and that the owners would have a right to sue for a loss against the shipper, the whole right to sue, and in the thing insured, by the abandonment, immediately transferred to the underwriters, the insurers, and they stand completely in the place of the owners of the goods, and have a complete right to the thing, whatever is remaining insured, and to have and maintain all actions necessary to recover a loss by the neglect of the shipper. See Hughes on Insurance page at top 329, &c. Also, see 2d vol. of Peter's Digest, page 515, where he cites the cases upon the "effect of abandonment."

5th. The right to abandon being conclusive in the owner

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of the goods insured, and they having in pursuance of this right abandoned to the underwriters, the plaintiffs in error, unless they, the plaintiffs, can sue and maintain this complaint, no other person can, for, by the law of insurance, all the right the insured had to sue, previous to the abandonment, is, by it, immediately transferred to the insurers, the plaintiffs in error; and if they cannot maintain this suit, it is clear the insured cannot, and so no one can;—here then would be a right but no remedy, and the shippers would be entirely released from any responsibility upon their undertaking to safely transport and ship the goods to the port of destination. It is, therefore, manifest that the circuit court erred in sustaining said demurrer, and giving judgment thereon for the defendant in error.

Geyer for Defendants.

The law requires that the plaintiff should set forth his demand in all *its particulars*. This complaint is said to be for non-performance of a contract of affreightment, and no contract whatever is set out, as having been made by any one on behalf of the Steam Boat Detroit.

The complaint sets forth an account for divers goods belonging, not to the plaintiff, but to others, as having been lost, but how, when, where, by whom, or under what contract, is not stated.

It is stated, that goods shipped on board the Lilly at Pittsburgh, to be transported to St. Louis, were re-shipped on board the Detroit under no contract, and that goods lost—whether by the Lilly or the Detroit, does not appear—were abandoned by the owners to the plaintiffs at St. Louis; but it does not follow, that the owners of the Detroit are liable for them.

It does not appear who shipped the goods, or on what contract; and, for any thing that appears, they were not lost by either boat, for they appear to have been abandoned to the Insurance Company at St. Louis.

If any goods were lost, it may have been by the peril of the river, or some other excepted peril.

If the loss happened before the abandonment, even upon the supposition that the carrier was liable, the action accrued.

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to the owners, and such right of action is not transferred to the office, by abandonment.

Underwriters can have no action in their own names against a carrier, for losses happening before their right of property accrues by the abandonment.

The complaint does not show that the contract was made, or that the loss happened within this State; nor, does it appear, that the action accrued to any one within six months next before the commencement of this suit.

Error to the Circuit Court of St. Louis County.

Opinion of the Court delivered by Tompkins Judge.

The St. Louis perpetual Insurance Company brought its action against the Steam boat Detroit, in the circuit court of St. Louis county. Judgment being there given against the company, they prosecute their writ of error to reverse that judgment.

The plaintiff filed his complaint against the Steam boat, under the provisions of the fourth section of the act to provide for the collection of demands against boats and vessels, found in the digest of 1835, at page 102. It is as follows: "The St. Louis Perpetual Insurance Company complains of the steam boat Detroit, in this, to wit: For mal performance of a contract of affreightment, to wit, dry goods from the port of the city of Louisville, commonwealth of Kentucky, to the port of St. Louis, State of Missouri, entered into by Thompson and F. A. Nants, clerks of said Steam boat Detroit, and is, in all particulars, as follows, to wit: for amount of dry goods lost from one box owned by F. S. Rutherford \$174, &c.," enumerating the charges for damages sustained, and some credits to the boat; and it then proceeds, "As, also, per bills of lading, to wit, three in number, two of which signed by William Gore, and one by Samuel Deane, master of Steam boat Lilly, at the port of Pittsburg, for said goods, with the privilege of re-shipping;" wherein, said steam boat Lilly obligated herself to transport said goods from the port of Pittsburg, to the port of St. Louis, Missouri; and which said goods were re-shipped, at the said port of Louisville, to be transported to the said port of St. Louis, Missouri, on said steam boat Detroit, by said steam boat Lil-

ly, as per privilege in said bills of lading, here to the court shown; and which said goods, lost as aforesaid, have been abandoned by the owners thereof, in the port of St. Louis, to the said St. Louis Perpetual Insurance Company; it having insured the safe transportation of the said goods to the said port of St. Louis, from the said port of Pittsburg, &c.

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To this complaint a demurrer was filed.

In the fourth section of this act, it is provided that the complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued; and that it shall be verified by the oath of the plaintiff, or of some credible person or persons for him, and shall stand in lieu of a declaration.

No objection is taken to the sufficiency of the affidavit. The act in requiring a complaint to be filed, and in declaring that such complaint shall stand in lieu of a declaration, clearly indicates a disposition, that it shall not be required to frame a complaint with the same regard to technical forms as is observed in a declaration at common law. A contract ought to be set out with proper parties. No person is named in this complaint as contracting with the boat, by its agents. Most clearly the boat made no contract with the Insurance Company. We are not told on what terms the goods were to be transported; as has been observed, by the counsel of the boat, these goods might have been lost by the perils of the water, &c., which are usually excepted. The terms of the contract, as to the re-shipment, are not set out; whether the Lilly, on board of which the goods were shipped at Pittsburg, might not be liable to the owner of the goods, and the Detroit answerable over to the Lilly, does not appear. The twenty-first section of the act, under which this action is brought, requires, that all actions against a boat or vessel, under the provisions of this act, shall be commenced and sued within six months after the cause of such action shall have accrued. Although, the complainant ought not to be confined to proving that the cause of action accrued on the particular day that may be named in the complaint, yet some time ought to be laid in the complaint, at least, as a date of the contract, to direct the attention of the defendant, so as

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entered into;
the quantity
of goods de-
livered; and
should also

show that the suit was commenced within six months after the cause of action ac-
crued: otherwise, the complaint does not "set forth the plaintiff's demand in all its
particulars," as required by the 4th section of the above act.

to enable him to ascertain whether he is annoyed by a stale demand. It would have satisfied the law if the party had related, with a moderate degree of certainty, who were the parties to this contract; when it was entered into; the terms, &c. The complaint appears to be entirely deficient in the requisites of a correct statement of the cause of action. It should properly have begun with a statement of the contract with the Lilly, at Pittsburg; the quantity of goods delivered, and so many bales, boxes, &c.; the time and terms of delivery; that part of the contract which authorized the Lilly to transfer the freight to the Detroit, &c. Then the breach might have been assigned. As the complaint is framed, it does not so clearly appear what right the company has to be plaintiff in this action, or to sue in its own name, on a contract which must have been made with others. Regard to the rights of the defendants, ought to have induced the plaintiffs to state where as well as when this loss took place, if it could have been done; as for instance, on board of which boat, if the character of the loss were such as to enable the plaintiff to state it.

The judgment of the circuit court was not then, in my opinion, erroneous, in sustaining the demurrer to the plaintiff's complaint. The other members of this court concurring in this opinion, the judgment of that court is affirmed.

MOORE V. BANK OF THE STATE OF MISSOURI.

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When an officer performs any act in pursuance of a duty enjoined on him by law, his official statement of its performance, is evidence thereof; therefore, the protest of a notary public of a negotiable promissory note, stating that such note was presented for payment, &c., is evidence of the facts stated in such protest.

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souri,

Appeal from the circuit court of St. Louis county.

Gamble for Appellant.

1st. Presentment was necessary, in this case, to charge the defendant Moore as endorser. Chitty on bills, 262, 402.

2nd. Protest of a promissory note, or inland bill of exchange, is altogether supererogatory and is not evidence of the facts stated in it. Chitty on bills 218. 6 Wheaton 146, 572. 8 Wheaton 326.

Bowlin for Appellee.

But two isolated questions arise, to wit: Was the protest of the notary evidence of demand? Was a demand necessary?

In support of the position that it was, the appellee relies upon the case of Drosser vs. Clemens decided in this court. 4th vol. Mo. decisions page 52.

On a negotiable note under the statute, made payable at a specified place, as the Bank of the State of Missouri, a demand is not necessary. The maker should have gone, and taken up his note within the banking hours, on the last day of payment.

In support of this see 6 Massachusetts Reports 524. 12th ditto 416, and 17th ditto 449, top paging. Bank charter sec. 29. Session acts of 1836-7.

Opinion of the Court delivered by Tompkins Judge.

The Bank sued Moore in the circuit court, and judgment was there given against Moore, to reverse which he appeals to this court.

The evidence preserved in the bill of exceptions is, that on the 24th of October 1827, one Wilcox made his note to be paid to the order of one Stine, negotiable and payable, at the Bank of the State of Missouri. The note was endorsed by Stine to Moore, and by Moore to the Bank, and protested for non-payment. A witness on the part of plaintiff proved, that he acted as clerk for the notary public: that it

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was his business to give notice to endorsers of the [dishonor of notes; that he had no distinct recollection of the fact of giving notice to the defendant, Moore, of the dishonor of this note, but he believed, from his practice in all like cases, that he had given Mr. Moore notice, either by leaving the notice at his place of residence, or at the post office in the city of St. Louis, the day after the note was protested: that Moore lives out of the corporate limits of the City of St. Louis, and that his practice is, when the endorser lives without the limits of the corporation, to leave the same at the post office in the city. He also testified, that he knew nothing of the fact of the note being presented for payment at the Bank of Missouri. The plaintiff offered the protest of the note in evidence, and the defendant objected to its admission, but his objections being over ruled, it was given in evidence. The defendant then moved the court to decide, that there was no evidence of the note having been presented at the Bank for payment; the court refused to decide this, and the defendant excepted.

The objection is, that the protest is not evidence of the note being presented at the Bank for payment. By the sixth section of the act concerning bonds and notes, found in the digest of 1835, such notes as this sued on here, are declared to have the same effect, and to be negotiable in like manner, as in cases of inland bills of exchange. By 7th section of the act concerning bills of exchange page 96, of the digest of 1835; it is provided, that inland bills of exchange, not paid according to the terms thereof, may be protested and damages recovered.

When an officer performs any act in pursuance of a duty enjoined on him by law, his official statement of its performance, is evidence thereof: therefore, the protest of a notary public of a negotia-

It is a principle of law, admitted universally, and acted on at this term of this court in the case of Guerno vs. Janis, that when an officer performs any act in pursuance of a duty enjoined on him by law, his act, thus performed, proves itself. See, to the same purpose, the case of Ronkendorf vs. Taylors lessee, (4 Peters R. 349, where it was decided, that the official tax books of the corporation of Washington City, made up by the Register, from the original returns or lists of the assessor laid before the court of appeals—he being empowered, by the ordinances of the corporation, to correct

the valuations made by the assessors, are evidence. But moreover, this note is endorsed by Moore, and the Bank has sued on it as its own property, as it might well do, for it is endorsed in blank, and the blank may be filled as the bank pleases; and the 29th section of the act to charter the Bank provides, that all bills and notes, whether under seal or otherwise, at any time discounted by the Bank, shall be placed upon the same footing as foreign bills of exchange, so that the like remedy shall be had for the recovery, against the drawer or endorser thereof, and with like effect, except so far as relates to damages. A part of the remedy, as I understand the law, is that notes may be protested, and the protest be, as in cases of foreign bills of exchange, evidence of the presentment for payment. The protest states that the note was presented at the Bank for payment where the note was payable, and this in my opinion, was sufficient evidence of presentment.

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ble promissory note, stating that such note was presented for payment &c. is evidence of the facts stated in such protest.

The judgment of the circuit court ought then, in my opinion, to be affirmed, and Judge Napton concurring in this opinion, it is affirmed.

McGirk Judge.

In this case I am not prepared at this time to give an opinion.

CAMDEN & CO. V. STEAM BOAT GEORGIA.

1. In a complaint filed against a steam boat for mal-performance of the contract of affreightment, for the transportation and delivery of property, the description of the property need not be more particular, than the description of the same contained in the bill of lading.
2. It is no objection to the complaint, that the subject matter thereof, is stated in different ways, so as to suit the evidence the plaintiff may be able to produce.
3. The complaint may be amended like a common law declaration; and, it is the duty of the court to grant permission to amend, as in ordinary cases at common law.

Error to the circuit court of St. Louis county.

Bogy and Hunton for Plaintiff.

By the record and assignment of errors in this case, these two questions are presented for the consideration of this court:

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1st. Is the complaint against the boat defective or insufficient, either in form or substance?

2nd. Did the court err in rescinding its order granting leave to the plaintiff to amend; or in other words, can a complaint under the statute against a steam boat be amended?

1st. By the statute authorising proceedings against steam boats, it is required, that the complaint shall set forth the plaintiffs demand in all its particulars, and on whose account the same accrued, and shall be verified by affidavit. See Mo. Statutes page 103.

In this complaint there has been a compliance with all these requisitions. The particulars of the demand are set forth.

2nd. Even if it be conceded, that the complaint is defective, surely the plaintiffs, on this application, should have had leave to amend. See session acts 1838 and 9, page 14, section 6.

Drake and Engle for Def'ts.

The defendant contends, that the circuit court was right, in the first place, in sustaining the demurrer, and afterwards in rescinding the leave to amend, and entering judgment on the demurrer.

In support of the first position, the causes of special demurrer, set out in the record, are relied on here.

First. That the complaint purporting to contain a cause of action against the boat, contains only a cause of action against the master.

Second. That the complaint purporting to set out the demand of the plaintiffs, "in all its particulars," does not so set it out, but sets it out in general terms, contrary to the requirement of the statute. See act first mentioned, Revised Code, p. 102, § 4.

Third. That the complaint, being sworn to by one of the plaintiffs, contains three counts, each repugnant to, and inconsistent with the others.

Fourth. That the complaint and the affidavit subjoined are repugnant to and inconsistent with each other, for that the

amount of damages laid in the complaint is different from and greater than that sworn to in the affidavit.

Fifth. That the complaint and the warrant thereon issued are repugnant to and inconsistent with each other, because the damages laid in the complaint are greater than the amount stated in the warrant.

Sixth. That the complaint contains no cause of action against the Boat, for that there is no contract of affreightment alledged to have been entered into by the master, owner, agent or consignee of the boat for and on her behalf, for the non-performance of which the said boat is liable in this form of action. First sect. of the 6th art. of the practice act (Rev. Code p. 467.)

Opinion of the Court delivered by Tompkins Judge.

Camden & Co., under the provisions of the act of 19th of March 1835, p. 102, of the digest of that year, commenced their action against the steam boat Georgia in the circuit court of St. Louis county, and that court having given judgment against them, they prosecute their writ of error to reverse that judgment.

The first count in the declaration contains a statement, that the master and commander of the steam boat Georgia, lying at Pittsburg, received on board of said boat, 16 bales of dry goods, one bale of dry goods, one cask hard ware, one box of shoes, four band boxes, and one trunk, all in good order, &c. to be conveyed and safely delivered at St. Louis, to said Camden & Co., the unavoidable dangers of the river navigation and fire excepted; and that the said Short did deliver a part of said goods, &c., at St. Louis, but did not take care of, and safely and securely convey the residue of said goods and merchandize, on board of said steam boat as aforesaid, from Pittsburg to St. Louis, and deliver the same to the plaintiffs, but that the remaining part of said goods &c., of the value of one thousand dollars, was wholly lost.

In the second count it is stated, that the plaintiffs caused to be delivered to said Short, on board of said boat, divers other goods and merchandize of the like number, quantity, quality description and value as those in the first count men-

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tioned, to be taken care of, &c., delivered to the plaintiffs at St. Louis; and that said Short took so little care of said goods, &c., that the said goods, being of the value aforesaid, were wholly lost to the plaintiffs, &c.

In the third count it is stated, that in consideration that the said Short, at his special instance and request, had the care and custody of divers goods and merchandize of the said plaintiffs, to wit: goods and merchandize of the like number, quantity, quality, description and value, as those in the first count mentioned, he the said Short undertook, &c., to take due and proper care thereof, but took so little care that the said goods, &c., were taken and abstracted from the boxes, &c., and wholly lost to the said plaintiffs, to their damage of one thousand dollars, &c.

The act above mentioned provides, in the second section, that any person having a demand against the owners of a boat for damages for the non-performance, or mal-performance of a contract of affreightment, or of any contract touching the transportation of property instead of proceeding against the master, owner, agent or consignee of the boat, may at his option, institute suit against such boat by name. In the fourth section the act provides, that the complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued; it shall be verified by affidavit either of the plaintiff or of some credible person for him, and shall stand in lieu of a declaration.

To this declaration a demurrer was filed; the plaintiffs applied for leave to amend; leave was given them, and the order of court granting the leave to amend was rescinded, and on demurrer the judgment of the court was given for the defendant. To sustain his demurrer, the defendant in error contends: 1st. That the complaint, purporting to set out the demand of the plaintiff's in all its particulars, does not so set it out; but sets it out in general terms, contrary to the requirement of the statute. 2d. That the complaint being sworn to by one of the plaintiff's contains three counts, each repugnant to, and inconsistent with the other. 3d. That the circuit court committed no error in rescinding the order granting leave to amend.

1st. The first objection urged against the declaration seems, for any thing appearing on the record, to be of no force, so far as it concerns the first count in the declaration. In that count it is stated that Short received on board 16 bales of dry goods, and 1 bale of goods, one cask of hardware, one box shoes, four band boxes, and one trunk. It could answer no good purpose to the defendant to have any statement more particular than that of the number of boxes &c. delivered to him. If the steam boat proves that the boxes, &c. were delivered by it in such order as they were received, it has proved all that is necessary to throw the burthen of proving special damage on the complainant. It can never be expected that the agents of a boat can or will examine the contents of a box or package of goods, which they undertake to transport; it would avail them nothing then, to state in the complaint the contents of such box or package. The plaintiffs will be compelled to resort to testimony to prove the contents of such box or package when delivered to the boat, and the quantity deficient or damaged when delivered to them. The complaint then appears to be sufficiently particular.

The second objection, viz. that the complaint sworn to, contains three counts, each inconsistent and repugnant to the others is, in my opinion, equally unfounded. The act requires that the complaint shall be verified by affidavit. The substance of the complaint is the amount of damages claimed. I can see no reason why a plaintiff should be barred of the usual privilege of stating his injury in different manners, to suit the evidence he may be able to produce. For the most honest and diligent may be deceived as to what he may be able to prove. Every plaintiff knows, that he cannot honestly prefer a claim for a greater number of boxes, &c. than he delivered, and, therefore, he is required to set forth the complaint in all its particulars, as he may be able to prove; and not to complain of the defendant because he does not deliver twice as many boxes, &c. as were received on board of the boat. But every plaintiff cannot conveniently, or rather without great inconvenience, know how much damage he may have sustained by the negligence

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of the agents of the boats, when the goods have been damaged; or, in many instances, when boxes have been opened, and in whole or in part emptied. The essential thing is that the plaintiff do not swear to too much damage; to enable the defendant to prepare for his defence, it cannot be material that the plaintiff should set forth his demand, in the complaint, more particularly than the several parts and parcels thereof are enumerated in the bill of lading. We have every reason to believe that the complaint, or declaration, in this case, is as particular as the bill of lading. It is then sufficiently particular; that is, the statement of the cause of action, is sufficiently minute and particular to comply with the requisitions of the Statute.

In the second and third counts the subject matter is thus stated: divers other goods and merchandize, to wit, goods and merchandize of the like number, quantity, quality, description and value as those in the first count mentioned. There is in the first count no statement either of the number or quality of merchandize; indeed, I do not well understand how the term "number" could be applied to goods and merchandize. If it had been stated in the second and third counts, that the master and commander had received on board, &c. divers other goods and merchandize, to wit, 16 other bales of dry goods, &c., as in the first count, the statement would, in my opinion, have been well enough made. But he has not done so. The demurrer to the declaration in this case is general, and may be sustained as to part of the pleadings demurred to, and overruled as to the residue, as if a separate demurrer had been filed to each pleading so demurred to. See 16th section of the 3d article of the digest of 1835, p. 459. The demurrer then will be sustained as to the second and third counts, and overruled as to the first.

The complaint may be amended like a commonlaw declaration; and, it is the duty of the court to grant permission to amend, as in ordinary cases at common law. As to the third point, to wit, the rescinding of order of court granting leave to amend, no reason is seen why a complaint of this kind should not be amended like a common declaration. The court should have granted that permission, as in ordinary cases at common law. As the case is decided on another point, it is useless to say more on this head. The judgment of the circuit court is reversed, and the cause is

remanded, with leave to the plaintiff to amend his complaint if he wish to do so.

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Opinion of McGirk Judge.

I am of opinion, that the leave to amend ought to have been allowed. I am of opinion, also, that the first count is well enough except as to the breach, and that that should have been at least as special, as to the goods not delivered, as the bill of lading is. I concur in reversing the judgment.

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Opinion of Napton Judge, dissenting.

The act for the recovery of demands against boats and vessels provides, that the plaintiff shall file a complaint setting forth his demand in *all its particulars*, and this complaint must be verified by affidavit. The object of this act seems to be, to require something more definite than a mere formal declaration, something more analogous to a bill of particulars. It was designed that a simple statement of the facts should be made, as they existed.* The complaint of the Messrs Camden is nothing more than an ordinary declaration, minute enough certainly, but containing three different counts, describing different and inconsistent facts. In the first count, the charge is, that a part of the packages, boxes, &c. were delivered according to contract, and the remainder lost. In the second and third count, the charge is, that all the boxes and packages therein described were lost, or not delivered according to contract.

This statement thus containing two distinct and inconsistent charges is verified by the oath of the party or his agent. I do not believe that the law intended to set traps for the unwary, by requiring them to swear to the formalities and inconsistencies of a common law declaration.

The circuit court did not err, in my opinion, in sustaining a demurrer to this complaint, nor do I perceive how the counts of a complaint sworn to, can be stricken out, or disregarded or amended. This is a proceeding highly remedial, and yet in derogation of the common law, and must be construed with strictness. No power to amend is given, expressly, in the act, and yet in the attachment law, an express provision was deemed necessary, to authorize amendments to an affidavit made in the proceedings under that act. This also is

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a proceeding in rem, similar to that in attachments, and property to a large amount, and a great variety of interests are liable to be affected by this summary proceeding. The act must therefore be strictly complied with. The circuit court did not err, in my opinion, in over ruling the plaintiff's application to amend.

BROTHERTON adm'r. of BROTHERTON dec'd. v. ANDERSON.

1. Where judgment by default has been rendered against a garnishee, for failing to appear and answer interrogatories,—in proceedings under the 17th sect. of the 2d art. of the act relating to attachments, R. C. 1835, p. 86,—the plaintiff must establish, by competent testimony, the amount of the indebtedness of such garnishee to the defendant; and final judgment can only be rendered against the garnishee for the amount which he actually owes the defendant, and not for the amount which the defendant may appear to owe to the plaintiff.
2. Where the justice, in such case, renders final judgment against the garnishee for the amount of the plaintiff's demand against the defendant—without any evidence to establish the amount of the indebtedness of the garnishee to the defendant—the judgment is irregular, and not cured by lapse of time.

Error to St. Louis Circuit Court.

Hamilton for Plaintiff.

1. We are not too late for this application, (2 vol. Mo. R. 229.) Nor is the plaintiff estopped from denying the legality of the proceedings before the justice, by having paid the amount of judgment. 6 Cowen 300. 10 Wendell 354.
2. The proceedings before the justice were wholly irregular, null and void. R. C. 84, sec. 3. R. C. 86, sec. 17. 1 Pet. U. S. C. C. Reports 30, 36. 10 Wheat. 192. 2 Cranch 445. 2 Mass. 213. 5 Han. and Johns. 130.

Bowlin for Def't. in error.

The defendant in error relies upon the statute regulating appeals from justices courts. The 2nd section of the 8th article, "but no appeal can be taken to a judgment by default, unless, within ten days after rendering such judgment, application shall have been made to the justice, by the party aggrieved, to set the same aside, and such application shall have been refused."

Sec. 3rd. "No appeal shall be allowed in *any case*, unless the following requisites be complied with: 1st. The appeal must be made within ten days after judgment rendered; or, when the judgment is by default, within ten days after the refusal of the justice to set aside the default and grant a new trial.

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Brotherton
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Anderson.

Opinion of the Court Delivered by Tompkins Judge.

On the fifth day of August, in the year 1837, the said John J. Anderson commenced an action before Joseph Walsh, a justice of the peace of St. Louis county, against J. Snowden Hopkin, by attachment, and James Brotherton, in his life time, was summoned as garnishee.

The suit was founded on a note for \$143.55. On the day of trial, Brotherton not appearing, the justice entered up judgment against him for the amount of the note. Execution was issued against Brotherton, and on the 27th day of September 1837, the execution was returned satisfied. On the 30th day of July 1838, the said James Brotherton departed this life, and Marshall Brotherton, the plaintiff in this proceeding, became his administrator. On 30th of April, 1839, Marshall Brotherton, administrator of said James Brotherton dec'd, having given notice to the said John J. Anderson, moved the justice to set aside the judgment, given as aforesaid against the said James Brotherton in his life time, for irregularity. The justice of the peace over ruled the motion, Brotherton, the administrator, prayed an appeal which was refused; and having stated these matters, in the form of an affidavit, he applied to the circuit court to make an order to the said Walsh, to show cause why he did not grant an appeal in the case above mentioned. The court over ruled this motion, and the plaintiff in the motion, Brotherton administrator as aforesaid, brings the cause into this court by writ of error.

In case the garnishee, being duly summoned, shall fail to appear at the proper time, the plaintiff may take judgment against him by default, which may be proceeded on to final judgment, in like manner as in cases between plaintiff and defendant; or, at the option of the plaintiff, the justice shall attach the body of the garnishee, until he shall make full and

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direct answers to the interrogatories required to be answered. See section 17th of the act to recover debts by attachment before justices of the peace, page 86 of the digest of 1835. To ascertain how to proceed to final judgment, in cases between plaintiff and defendant, we must resort to the act to establish justices courts, and to regulate proceedings therein.

Where judgment by default has been rendered against a garnishee, for failing to appear and answer interrogatories,—in proceedings under the 17th sec. of the 2nd art. of the act relating to attachments, R. C. 1835, p. 86,—the plaintiff must establish, by competent testimony, the amount of the indebtedness of such garnishee to the defendant; and final judgment can only be rendered against the garnishee for the amount which he actually owes the defendant, and not for the amount which the defendant may appear to owe to the plaintiff.

This being a judgment by default, we must resort to the fifth article of that act. By the first clause, of the first section, of that article, if the suit be founded on an instrument of writing, &c., and the plaintiff's demand be liquidated, judgment is given for what shall appear to be due by that instrument. But the second clause of that section provides, that if the suit be not founded on an instrument of writing, &c., and the plaintiff appears in person, or by his agent, the justice shall proceed to hear his allegations and proofs, and shall determine the cause as the very right thereof shall appear from the testimony; and if it appear from the testimony, that the plaintiff is entitled to recover, judgment shall be rendered by default against the defendant, for so much as the testimony shows the plaintiff entitled to, with costs, see page 359 of the digest of 1835. But on the part of Anderson, the defendant in this motion, it is contended, that the judgment ought to be given against a garnishee, in a judgment by a default, for the full amount that the defendant may appear to owe to the plaintiff; and the plaintiff's demand being founded on a note, that Brotherton ought to be adjudged to pay the amount of the note, otherwise no person summoned as a garnishee, would appear in obedience to the writ. The argument proceeds upon the supposition of much vice in the community, and the necessity of imposing a heavy penalty on the garnishee, for the interest of the plaintiff in the action. It is not reasonable to suppose, that the legislative body would require a garnishee, who perhaps owes but ten dollars to the defendant, in attachment to have a judgment by default rendered against him for \$143, merely because he failed to appear in obedience to the summons.—If indeed the plaintiffs have no evidence to establish the indebtedness of the garnishee to the defendant in their attach-

ment, and still believe that the garnishee is indebted, he may apply to the justice to attach the body of the garnishee, till he shall make full and direct answers. See section 17 of the law of attachments before justices, page 86 of the digest of 1835.

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The docket of the justice shows a judgment irregularly obtained by the plaintiff in the attachment, against the garnishee, such an irregularity is not cured by lapse of time.— Such being the opinion of this court on this point, it becomes useless to consider other points made by the counsel of Brotherton, the plaintiff in this motion. The circuit court will make an order to the justice, to allow the appeal from his decision on the motion of Marshall Brotherton, adm'r of James Brotherton; to set aside the judgment by default, which was entered up by said justice against said James Brotherton in his life time, summoned as garnishee as above mentioned, or, to show cause to the contrary. Such is the opinion of the Supreme Court.

Where the justice, in such case, renders final judgment against the garnishee for the amount of the plaintiff's demand against the defendant—without any evidence to establish the amount of the indebtedness of the garnishee to the defendant; the judgment is irregular, and not cured by lapse of time.

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ATWOOD VS. LEWIS.

Action founded upon two promissory notes executed by defendant to plaintiff, payable at one and two years. Plea: that, at the time of the execution of the notes, plaintiff entered into a written agreement with defendant, that if, at the time of the maturity of the notes, it should not be convenient for the defendant to pay the same, plaintiff should wait the convenience of defendant; in consideration of which, defendant agreed to pay interest; and that it was not convenient for defendant to pay. Held, to be no bar to the action; and, that if defendant had sustained any damage, by being compelled to pay before it was commenced, he must sue upon the agreement. (McGirk Judge, dissenting on this point.)

2. The plaintiff, in his demurrer to the defendant's plea, omitted to craveoyer of the agreement, of which profert was made in the plea; the circuit court permitted him to correct the mistake by interlining the demurrer. Held, that the court did not err, in this respect, as this was not amendment of the demurrer, but rather, an interlineation of a part of the record, which had been carelessly omitted before the demurrer was filed, which did no injury to the defendant, as he happened to have the instrument in court.

Appeal from the Circuit Court of St. Louis county.

Hamilton for Plaintiff.

1. A demurrer cannot be amended. It is believed there is but one instance on record, in which it was ever attempted. Maynard vs. Hopkins, Say 46. This is manifest upon principle. The party cannot thus be permitted to change under or depart from the grounds of demurrer as originally taken. An improper grant ofoyer does not affect a case in which it is granted. Wright's Reports 10. Theoyer furnished has not been made an available feature in the record, as it does not appear on the face of the plaintiff's own pleading, 1 Chitty, 468. It being accidentally incorporated into the record does not make it a part of the pleadings. The principal causes of demurrer specified, therefore, do not apply.

2. The second plea contains a good defence, Chitty on Bills, 161, 162.

3. The third plea is valid. Chitty on bills, 164. 1 Wendell, 317.

4. The plaintiff's declaration is bad, petition and summons is not the remedy. R. C. 105, Sec. 7.

5. The agreement was conditional. Kirby's Reports, 364.

It was made to depend upon the defendant's ability or convenience to pay. This must be shown. 7 Johns, 36. 17 Wendell, 419.

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6. If the oyer be spread upon the record so as at all to be brought to the notice of the court, it was sufficient to have shown the court that interest was not due by the contract, except upon the condition set forth. The court allowed interest in full.

7. But supposing the oyer to have been regularly ordered, and that the plaintiff had made it a part of his pleadings; the 1, 2, 3, and 4th cause of demurrer do not apply, inasmuch, as we do not proceed for the penalty under the agreement. We set forth a condition, making part of the original contract, in the one plea, and in the other, an agreement for a valuable consideration to extend the time of payment. That the performance of these is secured by a penalty, does not convert the defence into a proceeding to enforce that penalty. We show an agreement differing from that upon which the plaintiff brings suit, or so modifying or qualifying its terms as to enable us to insist that he is premature in suing for the recovery of the amount of the notes. 5. This specification does not apply, for the same reason that the plaintiff erroneously regards the defence as an effort to enforce the penalty. 6. The pleas go to the whole action, in alleging that which shows the debt is not yet due. The defendant has a right to set up the agreement by way of defence. 6 Wendell 291. 7. It is an admitted principle, that it is not sufficient merely to allege *quid duplex et caret forma*, but the point that is so must be precisely pointed out. 8. The convenience or ability of the defendant to pay is the issue tendered. If part of the contract, this must be shown. 7 Johns, 36. 17 Wendell, 419, already referred to. 9. If the pleas be contradictory and inconsistent, the statute furnishes a remedy. R. C. 459, sec. 24.

Darby for Defendant.

In looking into the record in this case, it will be seen that the only question to be decided is, whether the circuit court erred in sustaining the demurrer to the second and third pleas of the defendant.

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These pleas are manifestly defective on general demurrer. The second plea is defective for want of certainty as to time and amount. Stephen on pleading p. 341. Comyns Digest pleader, c. 19. Denison vs. Richardson, 14 East, p. 291. Stephen's pleading, p. 345. The plea, therefore, should have stated specifically that the plaintiff did wait with the defendant after the said notes became due, from a *certain day to be named* in the plea, to a definite period also to be named, and that the interest at six per cent on said notes amounted to a sum certain to be specified, which sum he, the said defendant, paid to the said plaintiff; for without this, there can be no traverse of the fact. Cowper's Reports, 2 vol. Carlisle vs. Keas, p. 671. 6 Term Reports, Grimwood vs. Barnett, 460.

In pleading the performance of a condition or covenant, the party must not *plead generally* that he performed the covenant or condition, but must show specifically the *time, place*, and manner of performance. Stephen's pleadings p. 382, side paging; same page 427 side paging; same 448, Common Digest; Pleader (E. 36.) 1 Saunders 28, N. (2.) 1 Term Reports 40. 6 Johns. 63, 2. Saunder's Rep, 127. 1 Chitty 478.

The pleas are not susceptible of any issue, and in fact, no issue material to the cause, is, or could be made to these pleas; the very object and intention of all pleadings, and without which, no plea is good. Chitty's Pleadings p. 474; 6 Johns. 63. Gould's pleading page 357. 18 Johns. Reports page 28, Hallet vs. Holms. See also 1 Chitty Pl. p. 510; 1 Saunders Reports 28, note 3.

A plea in bar of the plaintiff's action must be certain to a common intent, and direct, and positive in the facts set forth, stating them with all necessary certainty. Van Ness vs. Hamilton, 19 Johns. Rep. p. 349; 2 Condensed Reps. U. S. The U. S. vs. Gurney, page 132.

It is not a good plea for the defendant to state, that he paid a sum certain, without averring it to be the sum due. The amendment did not affect the pleas. But the granting of this amendment was no error. 1st section of 6th article of practice at law p. 467. Atwood vs. Gillespie 4 vol. Mis-

Missouri Decisions page 425. Wilkinson vs. Blackmel 4 vol. p. 428. Revised Code, page 459, sec 20. Statute of 1825, p. 627. Singleton vs. Mann, 3 vol. Mo. Decisions, page 464. 1 vol. Decisions of Missouri, page 318, Bellissime vs. M'Coy. McCallister vs. Mullanphy, 3 vol. Missouri Decisions, page 38. Johnson vs. White, page 223, 2 vol. Mo. Decisions. 1 vol. Miss. Reports, Simonds vs. Beauchamp, p. 589. Crump vs. Mead et. al. 3 vol. Mo. Reports page 233. 2 Condensed Reports S. C. U. S. Young vs. Breston, 98. 5 vol. cond. Rep. Tayloe vs. T. & S. Sandiford page 210.

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There is no error, and the whole case seems to have been decided according to the right and justice of the cause, and the judgment of the circuit court should therefore be affirmed.

Opinion of the Court delivered by Tompkins Judge.

Lewis brought his action against Atwood in the circuit court of St. Louis county, where he obtained a judgment, to reverse which Atwood appeals to this court.

The action is founded on two notes, the one dated the 24th May, 1836, for \$1023 33, payable two years after date, the other, for the same sum, payable three years after date.

The defendant pleaded three pleas: 1st, nil debet; 2d, that at the time he executed the said notes, and before the delivery thereof to the plaintiff, he, the said plaintiff, stipulated and agreed with the said defendant, by a written instrument of the same date with the said notes, of which profert is made, that if, at the time of the maturity of the said notes, it should not be convenient for the defendant to pay the same, the plaintiff would wait the convenience of the defendant to pay; in consideration of which, the defendant also, by said agreement, promised to pay the plaintiff at the rate of six per cent per year upon the amount of the said notes, for such time as the said plaintiff should wait for the payment of the said notes after they should fall due, which interest the defendant avers he has paid; and that when the notes became due, it was not convenient for him to pay the same, &c.

The third plea is the same as the first, except, that it is averred, that the agreement was entered into after the execution and delivery of the two notes. The plaintiff demurred to the second and third pleas; and on a subsequent day,

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he obtained leave to amend his pleadings, in the case, by craving oyer of the instrument of which profert was made. The agreement is, that whereas the said Atwood has executed his three promissory notes to the said Lewis at one, two, and three years, for the payment each of \$1023 33; and whereas said Atwood has secured to said Lewis the payment of said notes, by mortgage on real estate, the said Lewis agrees that at the time of the said notes falling due, if it is not convenient for said Atwood immediately to pay the same, that he, the said Lewis, will wait the convenience of the said Atwood; and in consideration thereof, the said Atwood agrees to pay the said Lewis interest at the rate of six per centum, upon the amount of the notes, for such time as the said Lewis may wait for the payment, after they become due, &c. The pleas, it, perhaps, may be necessary to observe, each contained an averment that when the notes became due, it was inconvenient to the defendant to pay, and still continued to be so, at the time when, &c. The counsel for the defendant relies on the case of Miller and others vs. Holbrook, 1st Wendel 317, to sustain the second and third pleas. In that case the action was assumpsit on a promissory note for \$1093, and it also contained a count for goods sold and delivered: plea, general issue. On the trial of the cause, after proof of making the note, the defendant offered to prove, that previous to the note becoming due, it was agreed by the plaintiffs to extend the time of payment, in consideration of the defendant agreeing to pay \$200 when the note should fall due, and giving his note for the balance; that the defendant, when the note did become due, did pay to the plaintiffs the sum of \$200, and offered his notes for the balance, pursuant to the agreement; that the plaintiffs took the money, but refused to accept the notes; that the defendant then required of the plaintiffs to return the money, which they refused to do, and commenced this suit. The court said, the bill of exceptions is frivolous, and the plaintiffs are entitled to judgment. The court go on then to say, that in Keating vs. Price, the defendant was allowed to avail himself of such an agreement, but it is to be presumed that in that case, it appeared that the promise to enlarge the time

of performance, was founded on a good and sufficient consideration, and none such appeared in that case. For any thing decided in that case we are left free to decide this case on its merits, as they present themselves to our own discretion. The defendant, in the cause before this court, assumes to pay the notes on a given day, and the plaintiff enters into another agreement with the defendant to wait with him, if, when the notes became due, he shall not find it convenient to pay, the defendant paying interest.

It is impossible for the plaintiff ever to prove when it may suit the convenience of the defendant to pay, and if he be a dishonest man, he will never admit that it suits his convenience to pay. It is most evident, that the plaintiff did not, by that agreement, intend to give the defendant his lifetime to pay the money in; and he has no means afforded him to prove that it is convenient for the defendant to pay. The defendant then must pay the money according to the terms of the notes, and if he has sustained any damage, by being compelled to pay before it was convenient for him to pay, he must sue on the contract, and have a jury to ascertain the damages which he may have sustained by reason of being compelled, in this action, to pay the amount of those notes, when it was inconvenient to do so. The jury are the only tribunal to find the fact of inconvenience, and the amount of damages sustained in consequence of this inconvenience.

The defendant objected to the leave given by the court to the plaintiff to amend the pleadings by craving oyer, contending, that a demurrer cannot be amended, and that having failed to crave oyer before he demurred, the plaintiff could not afterwards come in and crave oyer. He excepted to this decision of the court, in granting leave to amend by having oyer of the instrument of which the defendant in his plea had made profert. If any testimony had been given on the occasion, to be preserved in the bill of exceptions, the statute directs the party how to proceed to get the bill before this court, even when the circuit court refuses to sign his bill. He must procure it to be signed by three bystanders, &c.; if then the court refuse him leave to file, because it

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fore it was
convenient,
he must sue
upon the
agreement.
(McGirk J.
dissenting on
this point.)

The plain-
tiff, in his de-
murrer to the
defendant's
plea, omitted
to crave oyer
of the agree-
ment, of
which profert
was made in
the plea; the
circuit court
permitted him
to correct the
mistake by
interlining
the demurrer;
held, that the
court did not
err, in this
respect, as
this was not
an amendm't
of the demur-
rer, but, ra-
ther, an inter-
lineation of a
part of the re-
cord, which
had been care-
lessly omitted
before the de-
murrer was
filed, which
did no injury
to the defend-
ant, as he hap-
pened to have
the instru-
ment in court.

is untrue, he may take affidavits, and file them with the clerk. The court does not say that the facts stated in the bill of exceptions are untrue, but that they already appear on the record in the history of the cause, which it is the duty of the clerk to keep in his book. This is clearly my opinion, and if I even happen to be mistaken in that, the defendant already has his bill of exceptions legitimately before this court, for by the 23d section of the fourth article of the act to regulate practice at law, every court, to which an appeal or writ of error is taken, shall admit, as a part of the record of the cause, every bill of exceptions taken therein, upon its appearing satisfactorily to such court that the truth of the case is satisfactorily stated in such bill, &c. After the plaintiff had demurred to the pleas without craving oyer, the defendant could not be supposed to keep the instrument set out in those pleas in court for the convenience of the plaintiff; but he did keep it, and if he had sustained any damage by being compelled to produce it, and set it out on the record, it was *damnum absque injuria*, a damage of which the law makes no account. But it is not contended that the aspect of the cause is changed by making that instrument a part of the record. No reason then is seen why a mandamus should go to the circuit court to make that bill of exceptions a part of the record. It is true, as the defendant contends, that a demurrer cannot be amended; it is because a demurrer cannot be demurred to. I do not, however, understand, that craving oyer of the demurrer is an amendment of the demurrer; it is rather an interlineation of a part of the record, which had been carelessly omitted before the demurrer was filed, which could do no injury to the defendant, as he happened to have the instrument in court. The circuit court then, in my opinion, committed no error either in sustaining the demurrers to the second and third pleas, or in allowing the plaintiff to have oyer of the instrument, of which profert was made in the defendant's plea. Its judgment is therefore affirmed.

McGirk Judge.

On the last point I concur. But on the question of the effect of the covenant, I rather think it amounts to a release of

action, and let the plaintiff proceed to foreclose his mortgage.
See 2d Bac. Abr. 348, title covenant.

Napton Judge.

I concur in affirming the judgment—on the ground that the covenant here pleaded in bar did not amount to a release, and consequently could only be the ground of a separate action.

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MALLISON V. THE STATE.

1. In criminal trials the State may challenge, peremptorily, three jurors.
2. Indictment for murder: the jury having retired to consider of their verdict, returned into court, and asked the court whether, on an indictment for murder, they could find the defendant guilty of manslaughter only? The court told the jury, that they were the judges of the law and the facts: that they might find their verdict as they pleased, and that when the verdict should be rendered the court would decide upon its validity: Held, to amount to an instruction, and that having been given orally, the judgment must, under the provisions of the act of Feb. 13, 1839, (Laws of Mo. session 1838-9, p. 27,) be reversed.
3. The court adhere to their former decision, viz: that on an indictment for murder, the defendant may be convicted of manslaughter.

Opinion of the Court delivered by McGirk Judge.

At the May term of the circuit court for St. Charles county, for the year 1839, Mallison was indicted for the murder of one Samuel L. Holmes. The indictment contains two counts for murder in the first degree, as defined by the statute.

Which definition is thus, "Every murder which shall be committed by means of poisons, or by lying in wait, or by any other kind of wilful deliberate, and pre-meditated killing or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree"—R. Code, p. 157.

To this indictment the defendant pleaded not guilty. On the trial of which indictment, the jury returned a verdict of not guilty of murder, but guilty of manslaughter in the second degree, and assessed his punishment to four years imprisonment in the penitentiary.

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In the progress of the proceedings the State was allowed a peremptory challenge. This was excepted to by the prisoner. The 2nd point of objection is that the court gave oral instructions to the jury, when, by the statute, it is said, it should have been in writing: and third, the court refused to grant the prisoner a new trial: and 4th, the court refused to arrest the judgment. The 2nd, 3rd and 4th points are, in the arguments of counsel, again sub-divided into several points. I will proceed to examine these four points in the order as stated above, with their sub-divisions as they arise.

The first point to be considered is, did the court err in allowing the State a peremptory challenge. It is well known, that, at common law, the prisoner was allowed a peremptory challenge, to be exercised at his will, pleasure, and even caprice. This was given in tenderness to human life. It is equally well settled, that, by the same law, the crown was not allowed any such challenge, but submitted to the idea that, on questions of this sort, the King and government of England, were elevated above likes, dislikes, whims and caprices regarding any, and all the subjects of the kingdom.—4th B. 353. 3 Bac. Ab'nt 762. It is not pretended by the State's counsel now, that the common law, as adopted in Missouri, gives the State any claim to the right. But the claim is placed on the 13th section of the jury law. Revised Code of 1836, page 343. The act is entitled: "an act concerning grand and petit jurors." The act provides for the summoning grand and and petit jurors, describes their qualifications and duties in part. Then the 13th sect. declares: "In all civil and criminal trials by jury, either party may challenge, peremptorily, three jurors, and either party may require the officer to return eighteen in the first instance." Then the 14th sect. authorizes the court to have summoned a special jury in civil cases. Messrs. Bates and Conlter admit that the sect. is broad enough, and large enough in its terms, to sustain the claim of the State. But they insist, that the sole object of the act was not to enlarge the powers of the State, but only to provide a mode for obtaining jurors, as a general thing for the use of the court.—They also rely on the R. C. page 489, sect. 3, where criminal

practice is regulated, to sustain their view, which, they say, grants and limits the number of challenge: to the defendant, and gives none to the State, and they rely on the 4th sect. as being particularly explanatory of the meaning of the law maker.

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This 4th sect. provides, that "there shall be summoned and returned in every criminal cause, a number of qualified jurors, equal to the number of peremptory challenge, and twelve in addition." It is to be observed, that the first part of this act provides for the cases in criminal matter: when there shall be jury trials, and who shall be jurors. The 3rd sect. provides and declares the number of peremptory challenges the defendant shall have in capital cases, which is twenty. It then points out the number to be allowed in other cases to defendants. The 4th section provides, that there shall be summoned and returned in every criminal cause, a number equal to the number of peremptory challenges, and twelve in addition. This statute makes no provision, nor does it say one word in regard to a peremptory challenge in behalf of the State. It was passed the 21st March 1835. The act respecting jurors was passed March 17th 1835.

It is insisted, that the act of 21st March, which is silent as to challenges in behalf of the State, being the last statute repealed the statute of 17th March, and that the statute of 21st March having taken up the whole question of challenges it is fairly to be supposed it was the intention of the Legislature that the State should have no peremptory challenge.

On this question my opinion is, that the last act does not repeal the first act. There is in it no repealing clause, and both statutes may well stand together. It is a rule of common law construction, that statutes ought to be so construed that all can stand; and that all the statutes, passed at the same session, are to be taken as one statute. There is also another rule, which is, that statutes made in *pari materia* are to be construed together. This rule I adopt in this case. It will then read in the first part thereof, that in all criminal cases, (no matter of what nature great or small,) the pri-

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soner, or criminal, as well as the State, shall have a peremptory challenge of three jurors. Then, by the latter part of the statute, the subject is again taken up, and the legislature more fully enlarge the rights of the prisoner criminal in capital and penitentiary cases, in both of which cases, the challenge without cause is extended to twenty; where the imprisonment is for life, now in the penitentiary, the challenge is twelve, in other cases to four. This all will stand with the first part of the statute except that, in cases not enumerated as above, the challenge is increased one; but, still, the challenge to the State is not by any thing in the last act, in any way infringed. I therefore am of opinion that there is no error on this point.

The second point made is, that the court gave oral instructions to the jury, when by law all instructions in criminal cases must be in writing. It is enacted by the act of 13th of February, 1839, sec. 1st, That in no criminal case shall any court give to the jury any charge or instruction on any question of law or fact, except the same be in writing and filed in the cause; and that if any court violate that statute, the party may except, and for such violation the cause or judgment *shall* be reversed at the instance of the aggrieved party. A bill of exceptions taken in this case, shows, that the jury came into court, after having retired to consider of their verdict, and demanded of the court, whether they could, on this indictment for murder, find the defendant guilty of manslaughter only. To which question, the court told the jury, that the court had not yet decided that point; that the court did not know the supreme court had decided the point: they were the judges of the law and the fact; that they might find their verdict as they pleased, and that when the verdict should be rendered, the court would decide on its validity. It also appears that this information was oral. It is now objected that this was error, and against the express words of the statute.

Indictment
for murder.

The jury, having retired to consider of their verdict, returned into court, and asked the court, whether, on an indictment for murder, they could find the defendant guilty of manslaughter only? The court told the jury, that they were the judges of the law and the facts; that they might find their verdict as they pleased, and that when the verdict should be

Mr. Geyer for the State, insists, that here is the question propounded by the jury to the court, to wit: On indictment under the laws of the State for murder, if the jury should be of opinion that the defendant is not guilty of the murder, can

they acquit him of the murder, and on the same indictment, if they think him guilty of manslaughter, find him guilty thereof. This question has already been decided by this court in the case of the State vs. Watson, 5th vol. Missouri R. 497. In which it has been decided, that the jury can so find, and that the finding will be binding and lawful. The counsel insist that the court now reconsider the question: First, for the reason that in that case Judge Edwards did not concur, and again, that, perhaps, a second argument and consideration, may produce a different result, stating, that they are not satisfied with the decision, and propose now to show it is wrong. Accordingly, we have reconsidered the case, and all the arguments, and we are still of opinion the decision is right. When the case of Mallison was tried at St. Charles, the case of the State vs. Watson was decided but not published, but now it is in print. I will now proceed to pay some attention to the reasons and arguments of Messrs. Bates and Coalter, against the finding of the jury, and the opinion in Watson's case. It is first insisted by them, that with regard to crimes and punishments, except in cases where by the common law the punishment would only be fine and imprisonment, Revised Code. 378, the common law of England is not the law of Missouri. They insist that with regard to the definition of murder, larceny, and most other offences, the statute has created and defined the offence, and that, therefore, the common law, in no sense of the subject, can have any force or bearing regarding such offence.

I understand this court to be of opinion, that in all cases where the statute has defined any offence, by describing the facts or acts which shall be criminal, that such facts or acts are criminal, and that with regard to the name given to such facts and acts, such is the name of the offence; and, farther, that the Legislative punishment annexed to the offence is the legal punishment. Also, that in cases where the statutes only provide a punishment for an offence, by a common law name, the common law must be resorted to for the purpose of ascertaining what facts and ingredients constitute the offence, and farther, that all the rules of evidence in criminal

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rendered the court would decide upon its validity: Held, to am't to an instruction, and that having been given orally, the judgment must, under the provisions of the act of Feb 13, 1839, (Laws of Mo. session 1838-9, p. 27,) be reversed.

The court adhere to their former decision, viz: on an indictment for murder, the defendant may be convicted of manslaughter.

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cases, except where altered by the statute, are law here. It is argued, that because the Legislature have taken up the subject at large in the Rev. Code, respecting crimes and punishments, that such code is the only law on the subject. No member of this court agrees to that. If it were so, the consequence would be, that in no case would a court be able to proceed through to final judgment, without having in some matter to take its own discretion, feelings or bias for the rule of decision. This would place the citizens in an unenviable situation. I shall not pursue this subject any farther. The argument is, that Watson's case is wrong, because in that case it is said that at common law homicide is the genus, and murder, manslaughter, &c., are the species. All that is meant by the expression is, that homicide is the general name for the act of killing or taking the life of a human being, without any regard to the malice, wickedness of heart, or innocence of purpose with which the act is done. It is a mistake to suppose the opinion assumes homicide in the abstract, without adjuncts, or qualifying, explaining, or restraining, is murder. Homicide, unexplained by the actor, is murder; no indictments, however, are framed at common law for this by that name, because the common law deems this description too general.

It will be seen, by reference, however, to the statute, R. C. 167-8, that the word *homicide* is used freely and liberally as a generic term. The statute declares when homicide shall be deemed felonious. It declares what shall be the consequences when the same is justifiable or excusable, &c. So much for this objection taken to the opinion. The other objections go to the whole question. I will in a brief manner examine that question.

It is insisted that to indict a person for murder by lying in wait, perpetrated by *shooting with guns or pistols*, or by stabbing with *swords, spears or Spanish knives* which would be murder in the first degree, and then for the jury to find the defendont guilty, under that indictment, for manslaughter in the 3rd degree, which would be where the Captain of a steam boat, or other person having charge of the boiler,

shall from ignorance or gross neglect, or for the purpose of excelling another boat in speed, create, or allow to be created, an undue quantity of steam, so as to burst the boiler whereby any person shall be killed. Such Captain, &c., is guilty of manslaughter in 3rd degree, and to sustain such finding would be both unjust, unfair, and unconstitutional, because such indictment would clearly not give the prisoner any notice of the true nature of the charge against him. It is admitted that in such a case the conviction would be unjust and unlawful, and that a new trial ought to be granted. The view taken of this subject by the State's counsel appears to be the proper one, which is, that in every case of an indictment for murder, the form of the killing must be set forth, and that under that indictment no evidence of any other form of killing ought or could be admitted. The fact and form of killing being proved, the prosecution would have no more to do. Then it would be the business of the defendant to prove and establish as many qualifying circumstances so as to make the *homicide*. manslaughter only in some of the forms of that kind of killing, or justifiable or excusable. If this principle in practice is carried through the statute respecting crimes, it is believed the difficulties will be greatly lessened, still it will be admitted there will remain difficulties, but they must be gotten over as they arise, or provided for by new legislative enactments. I am disposed to pursue this subject no farther, believing that it is often an evil for a court or legislature to attempt too much. It is my opinion then, that there is no error on this point.

With regard to the other questions made and argued in this cause, it does not become necessary to examine them. The question made respecting the affidavits of the jurors could only be useful on the motion for a new trial. As there is on the record reasons already found for reversing the judgment, a new trial is the consequence. As to the question of a new trial on the merits, this court forbears giving any opinion.

This cause is remanded to the circuit court of St. Charles county, to be proceeded in, in conformity to this opinion.

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DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

FIRST JUDICIAL DISTRICT.

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1. Defect or unsoundness in a chattel sold cannot be set up in bar of a recovery on a note given for such chattel, unless the vendee, on the discovery of such defect or unsoundness, returns or offers to return the chattel purchased, or shews it to be valueless. Napton Judge dissenting on this point.
2. The 7th section of the 5th article of the act relating to justices' courts, (R. C. 1835, p. 359,) is applicable only to suits instituted before a justice of the peace.

Appeal from Circuit Court of Cooper County.

Adams and Hayden for Appellant.

1st. That a partial as well as a total failure of consideration is a defence in an action on a note for the purchase money of an article sold—to defeat the recovery in whole or in part. 2nd Kent Com. 473—4, third edition. 8 Cowen 31. S J. R. 452. 14 J. R. 377. 9 J. R. 232. 15 J. R. 230. 6 Pickering Rep. 427. Fegan vs. Meredith 4th Mo. Rep. 514.

2nd. That the instruction given by the court required that the defendant should have given notice of the defects in the carriage to the plaintiff, and in this it was calculated to mislead the jury 2 Pirtle's digest 240—1.

3rd. That the plaintiff was an assignee of the note sued on, and against him the defendant could make the same de-

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fence, that he could against the payees before assignment, and to do this he was not required to give the assignee notice of the defects, as set forth in the instruction. See laws of Missouri, digest 1835, title, bonds and notes, page 104-5.

Miller and Leonard, for Appellee.

1st. That evidence in mitigation of damages for a breach of warranty in the sale of a chattel, or for a partial failure of consideration in cases not tainted with fraud, is inadmissible and should have been rejected by the circuit court in this case. See 12 Wheaton 183. Thornton vs. Wynne, cited in condensed Rep's, vol. 6 p. 509, and cases cited. 1st Dana's Rep's 273. Lightburn vs Cooper. 1st Littell, Allison vs. Noble page 279.

2nd. That fraud in the sale of a chattel cannot be set up in bar of a recovery of a note given on such sale unless the vendee, on the discovery of the fraud returns the article purchased, to the vendor, or shews it to be entirely destitute of value. See 3rd Wendell, Benton vs. Stewart, page 236.

3rd. That in this case, evidence in mitigation of damages is wholly inadmissible, as there was no evidence of any notice having been given by the defendants to the payees, of such insufficiency. See 3 Wendell, Benton vs. Stewart page 236. Chitty on Contracts, p. 168.

4th. That the court very properly overruled the instructions prayed for by defendant, and very properly overruled the motion for a new trial and in arrest of judgment.

Opinion of the Court delivered by Tompkins Judge.

Huston assignee of J. L. and Milton Matthews brought his action of debt against Ferguson on a note made by said Ferguson to said J. L. and Milton Matthews.

The circuit court gave judgment against Ferguson; and to reverse that judgment this appeal is prosecuted.

On the trial of the cause, after the plaintiff had given the note in evidence, the defendant introduced evidence to prove that the payees of this note were carriage makers, and that he was a carrier of the mail from Jefferson City to Boonville in Cooper county, his residence, and that the payees re-

sided in Columbia in Boone county: and that the de- AUGUST TERM.
 fendant in the fall of the year 1837, applied to the payees **1840.**
 to make him a two horse mail coach; that they un- Ferguson
 dertook to make him a coach suitable for carrying the v
 mail on said route, for three hundred dollars: that whilst Hustor.
 they were making said coach, they were informed by
 the smith that the irons were too light and weak; and that
 said coach, when it was delivered to the defendant, had on
 it a thick coat of paint, calculated to hide its defects; and
 that after performing one or two trips, as a stage coach, it
 became so wrecked as to be unfit for use. The plaintiff gave
 some rebutting evidence.

The defendant in the circuit court, appellant here, asked
 of the circuit court several instructions, which are in sub-
 stance as follows:

1st. If they believe from the evidence, that the note sued
 on was made in consideration of a carriage manufactured by
 the payees of said note for said defendant, for the purpose
 of a mail coach; and if they also find that said carriage was
 worth nothing, then they must find for the defendant.

2nd. If they find that the consideration has wholly failed,
 they must find for the defendant.

3rd. If they find a partial failure of the consideration of
 said note, then they must deduct the amount of such failure
 from the amount of such note.

4th. If they find that the carriage aforesaid was made for
 a mail coach, by the payees, and that it formed the conside-
 ration of said note, and that said carriage did not answer
 the purpose for which it was made, and that the defendant
 offered to return the same in a reasonable time to the payees
 after it had come into his possession, then they must find for
 the defendant.

5th. If they find that the payees of the said note were
 carriage makers, and as such made and sold the said carriage
 to the defendant, for the purpose of a mail coach, that in
 such case there was an implied warranty on the part of
 the payees, that the said carriage would answer the purpose
 for which it was made and sold, and if they further find that
 the carriage did not answer the purpose aforesaid, then the

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said payees are liable to the said defendant upon their warranty aforesaid, and that the amount of the said damages are to be taken into consideration by the jury, and deducted from the amount of the recovery by said plaintiff upon said note.

6th. That although the defendant did not offer to return the said carriage in a reasonable time, and although he gave no notice of its defects to the payees of the note, yet if the jury find that it was purchased for a mail coach, and formed the consideration of the said note, and if they further find that it was made and sold to the defendant by the payees aforesaid as carriage makers, and if they further find that said carriage did not answer the said purpose, then they must take into consideration such defects, and deduct the amount of the same from the plaintiff's recovery.

The circuit court refused to give any of the instructions above prayed.

The circuit court having refused the instructions asked above, gave these following.

1st. If the jury believe that the work was fraudulently executed, or that it was done by contract for a certain purpose and failed to answer the purpose for which it was designed, and shall further find that it was wholly worthless, they will find for the defendant.

2d. But if the jury believe the work was worth any thing, and that the defendant has failed to give notice of its defects, in a reasonable time to the plaintiff, or to return the same, then he is to be presumed to have acquiesced in the defect of the work, and is not entitled to any deduction from the amount of the note.

The instructions given by the court were excepted to, and the refusal of those asked was also excepted to. A new trial was also asked and refused. The reasons assigned for asking a new trial, were that the court had erred, both in giving and refusing instructions as above mentioned.

So much of the instructions asked by the defendant, and so much of those given by the court, as relates to the necessity of an offer to return the carriage to entitle the defendant to a verdict, is not warranted by the evidence in the

cause; there being no evidence given that the defendant did offer to return it.

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The points material to a correct decision of this cause are;

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1st. If the carriage be worth any thing, can the defendant avoid the payment of his note without either returning or offering to return the carriage within a reasonable time after the discovery of the unfitness of said carriage for the purpose for which it was constructed?

2nd. Is the defendant entitled to a set-off against his note for any omission of the payees to execute the work faithfully and skillfully?

It is admitted by the counsel for the appellee, plaintiff in the circuit court, Huston, that there are authorities on each side; but as those authorities are diligently collected by the respective counsel, and will be, under the provisions of the statute, printed along with this opinion, I shall not review them, but content myself with giving my reasons for my own opinion. To this method I am the more inclined, because, the court, at this term, consists of only two judges, and they differing in opinion, the judgment of the circuit court is affirmed by operation of law.

We learn from Bacon that "At common law, if the plaintiff was as much or even more indebted to the defendant, than the defendant was indebted to him, yet he had no method of striking a balance; the only way of obtaining relief was to go into a court of equity. To remedy this inconvenience, it was enacted by statute 2d of George 2, that where there were mutual debts between the plaintiff and defendant, or if either party be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set off against the other; and such debt may be given in evidence on the general issue or pleaded in bar, as the nature of the case shall require so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt intended to be insisted on, and upon what account it became due, &c." 6 Bacon, title set-off, letter A.

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At letter C. in the same title, the author tells us that "If having been doubted, whether mutual debts of a different nature could be set off against each other under the above clause of the act of the 2 of George 2, it was enacted by 8th George 2, that by virtue of the said clause mutual debts may be set off against each other, either by being pleaded, &c. notwithstanding such debts are deemed in law to be of a different nature, &c."

Under these acts, it was decided that a set-off cannot be pleaded to an action of covenant for general damages, so neither can uncertain damages be pleaded by way of set-off to an action of covenant for rent, see same author, same letter and title. "And a defendant cannot set-off a claim for bad debts made by the misconduct of the plaintiff in selling goods as factor, such misconduct is properly to be inquired into in a suit for that purpose."

But it will be answered, that the defendant in the cause now to be decided does not call the allowance, which he claims in this case a set-off. If it had been so called, I can scarcely imagine, that any court would have decided that it ought to be allowed. Yet that is the true name, for it cannot be called a payment which is made in what the note calls for, viz. money; nor can it be called a satisfaction, for that is made in something else than what is promised in the note to be paid, and which must be accepted by the payee in place of what is promised to be paid. The English courts would not allow a set off of damages to be recovered in an action founded on the contract. But if the defendant be entitled to recover from the plaintiff in this cause any damages for any defect in the carriage, which appears to have been the consideration of the note sued on, those damages must be recovered in an action in form *ex delicto*. Much less then would an English court allow a set off of such damages.

Having reviewed the English Statutes of set off and the decisions of the courts on those statutes, I will proceed to review our own statutes on that subject. Our first act was passed in 1804. That act provides that. "If two or more dealing together be indebted to each other in bonds, bills, bargains, promises, accounts or the like, and one of them

"commence an action in any court, if the defendant cannot gain say the deed, bargain, or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or demand; and give any bond, bill, receipt, account or bargain in evidence," and judgment was by that law directed to be given in favor of the party plaintiff or defendant in whose favor the balance was found. Thus stood our law of off-set till the 8th December 1818, when the law was so changed as to allow judgments to be set-off. If it may be proper to refer to the history of that law, I can say it was introduced by an experienced and accurate lawyer; from the county of St. Louis alone there were three members of the house where the bill originated, who ranked among the ablest in the territory, and one of them still remains a member of the bar, and maintains his ascendancy. In that house no one member of the bar expressed a doubt of the necessity of the amendment. By this also, it was made necessary to give notice of set-off unless it were pleaded in bar. In the revised code of 1825, this law was left as it was framed by the Territorial Legislature of 1818; and in that of 1835, it reads thus: "If any two or more persons are mutually indebted in any manner whatsoever, and one of them commences an action against the other, one debt may be set-off against the other; although such debts are of a different nature. In all the changes debt, viz: demands founded on the contract alone are allowed to be set-off."

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It is not asserted that our own courts have in all this time decided otherwise than in strict accordance with those of England. Indeed I am not informed that they have in any case been solicited even to decide otherwise than those of England did, until this cause was brought up. This being the case, it appears to me that it would be an assumption of legislative power in the courts, were they to decide as it is here contended they ought; that the defendant should be allowed to set-off against the note sued, any damages he may have sustained in consequence of the ill execution of the carriage given in consideration of this note. In this view I am confirmed by several considerations 1st. We have

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courts of chancery as they have in England, to whom application may be made for relief in cases of peculiar hardship.

2nd. Such notes are, with us, assignable, and the assignee may, by statute, sue on them in his own name, which in England he could not do: by this act the legislature indicates a wish that they should, in some measure, supply the place of money; and their value in this respect would be much lessened, if those notes were to be reduced in the nominal value for any injury the maker may have sustained by a failure, in part, of the consideration.

The 7th section of the 5, article of the act relating to justices courts (R. C. 1835, p. 359.) is applicable only to suits instituted before a justice of the peace.

In the third and last place the legislature had the subject under their consideration, on one occasion, and allowed the consideration of such notes, as were sued on before justices of the peace, to be impeached either in whole or in part, but made no such provision for suits on notes commenced before the circuit courts, see page 359, of the digest of 1835, sec. 7, of 5th article of the act to establish justices courts and regulate proceedings therein. The whole law of set-off is an innovation on the common law, and as such, it ought to be strictly construed. Neither our own Legislature nor that of England ever permitted any thing but demands in form ex-contractor to be off-set. And the last mentioned act of the legislature of Missouri giving the justices courts power to impeach the consideration of notes &c. is in my opinion a command to the other courts to refrain from such acts. The common law, in my opinion, is, and ought to be, that as the maker of the note failed to return the carriage, or to offer to return it, within a reasonable time after the alleged defect was discovered, he cannot now make any good defence against the payment of the full amount of the note unless he prove that it is worth nothing at all. The instruction of the circuit court was, in my opinion, more favorable to him than it should have been. For the reasons above given its judgment ought, in my opinion, to be affirmed.

Dissenting opinion of Napton Judge.

The only material question presented to the court by this record is, whether a vendee, who has, without objection,

accepted articles manufactured for him, is entitled, in an action brought against him on a note for the price, to show, by way of reducing the damages, the inferiority of the articles to those contracted for, though the contract has not been rescinded by an offer to return them.

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It is not very difficult to account for the admitted diversity of opinion among the courts, not only of England but of this country, in relation to the proper rule on this subject.— The impracticability of laying down any general rule that will inflexibly govern the construction of contracts, which assume such an infinite variety of hues, in the ordinary transactions of life, will not be a matter of astonishment. The great stumbling block to a rational and uniform rule on this subject has however been ancient judicial precedent.— Whilst some tribunals have felt themselves constrained to adopt to some extent, the innovations, which modern practice has sanctioned, others have yielded entirely to the supposed authority of antiquated precedent, and a third class of judges have rejected the practice which they suppose to have never been sanctioned by that “perfection of reason” which is claimed to be synonymous with the common law, or the reason of which has ceased to exist. It does not become me to say, which course should be applauded or which condemned. The fact, that such variety of opinion has existed, and that this variety can be as distinctly traced to the causes alluded to, is all I undertake to assert.

The following propositions may at least be assumed as fairly deducible from the reported cases.

1. If the fraud or breach of warranty goes to the entire consideration, it may be plead or given in evidence, in bar to an action on the contract or security, and no offer to return the property is necessary.

2. If the fraud goes to a partial failure of consideration, it vitiates the contract, and leaves it in the power of the vendee, by a return of the property in a reasonable time, or an offer to return the same, to rescind the contract and avoid the payment of any thing.

3. If there be a breach of warranty, without any fraud,

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in the sale of a *specific chattel*, it seems to be pretty well settled that the vendee after accepting the article is not at liberty to rescind the contract in toto, without a previous agreement to that effect, or the subsequent assent of the vendor.

4. If there be a breach of warranty in the sale of *manufactured articles* by the manufacturer, the vendee may have a reasonable time to return the articles, and if in this case, there be a return or an offer to return, the payment of the price will be avoided.

5 If in this last case, there has been no return of the articles, or notice of their defects given, the question arises, whether such conduct, on the part of the vendee amounts to a waiver of the breach of warranty, or whether he still has his remedy, and if so, is he forced to his cross action on the warranty.

The first four propositions are, I believe, not disputed, but a satisfactory solution of the last must determine the merits of this case.

In England, a distinction has been drawn between suits on the original contract and those founded on the security; in the latter case, the party must resort to his cross action.—*Morgan v. Richardson*, 1 Camp. 40. 2 Camp. 346. *M. and M.* 483. *Chitty on Contracts* 867. Where the suit is for the purchase money, it has been held, without any difference of opinion, at least during the last thirty years, that the defendant may, in reduction of the damages, show the breach of warranty as to the quality of the articles sold, without any return of the articles or notice of their defects *King v. Borton*, 7 East. 481, note, *Cormack v. Gilles*. 7 East. 480, *Germaine v. Burton*. 3 Stark. Rep. 32, *Barton v. Butler*.—7 East. 480, *Street v. Blay*. 2 B. and A. 456, *Fisher v. Samuda*. 1 Camp. 190.

Mr. Starkie, in his treatise on Evidence, (vol. p. 645,) thus lays down the established doctrines in England, on this subject, "Where the article of sale is warranted, it seems that the vendee is entitled to prove the inferiority, and the breach of the warranty, in diminution of the damages, although a specific price has been agreed for, and although he has not

rescinded the contract *in toto*, as he might have done by re-
turning the article. This is not open to the objection, that
the defendant ought to have rescinded the contract *in toto*,
for, from the very nature of the contract of warranty he has
a right to keep the goods, and recover damages for the breach
of warranty, he may either rescind the contract altogether,
by returning the goods, provided he return them as soon as
the breach is discovered, and whilst they remain in the same
state, and within a reasonable time, and refuse to pay the
price, or recover it in case it has been paid, or he may re-
tain the goods and recover the difference between the real
value and their value as warranted; and therefore it is *just*,
as well as convenient, that he should be permitted to prove
the breach of warranty in the first instance, in diminution of
damages.

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In *Basten v. Butler*, (7 East. 480,) the case of *Cormack v. Gillies* is cited. It was there held, that as the purchaser of the warranted article may return it and still maintain an action for a breach of warranty, it follows that he ought to be permitted to prove the inferiority of the article, in diminution of damages, or an action brought by the vendor to recover the stipulated price, instead of compelling him to pay the whole stipulated price in the first instance, and to leave him to his remedy to recover for the breach of warranty in another action. The same doctrine was held by the court of King's Bench in the case of *Germaine v. Burton*, (3 Stark. R. 32. 14 cond. E. C. and R. 152.) That was an action of assumpsit for goods sold at a specific price by sample and it was held by the court, that the defendant might prove in diminution of damages that the goods did not correspond with the sample. This decision proceeded on the ground, that a sale of goods by sample, was a sale by warranty, a doctrine that has been previously established in the case of *Parker v. Palmer*, (4 B. and A. 357.)

In the case of *Street v. Blay* (2 B. & A. 456,) Lord Tenterden C. J. reviews most of the cases on this subject; and whilst he dissents from a portion of the doctrine laid down in *Starkie*, and grounded on the opinion of Lord Eldon in the case of *Eustis v. Harmay* (3. Esp. N. P. C. 83,) he entire-

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ly sanctions the legality and propriety of so much of that doctrine as relates to a reduction of the damages by proof of the inferiority of the article warranted. He maintains the position, afterwards sanctioned by the Supreme Court of the United States in the case of *Thornton vs. Wynn* (12 *Whea.* 183,) and which is substantially stated in the third proposition I have above assumed, and then proceeds to observe, "If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot, by his own act alone, unless in the excepted cases above mentioned (that is, where there has been a condition in the contract authorizing a return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether,) re-vest the property in the seller and recover the price when paid, on the ground of a total failure of consideration, and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. *On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, it should seem, of avoiding circuity of action; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.*"

Such is the doctrine in England in relation to breaches of warranty, where no fraud is alleged, and in order to apply the principle to the case now before the court, it may be necessary to show that the law implies a warranty, in the case of articles manufactured for specific purposes. Since Sir William Blackstone declared that the English common law recognised no implied warranty in a sale of personal chattels, except a warranty of title, the courts of the highest authority in that country, have recognised a very different rule, as existing at common law, or have very much modified the old one laid down by that learned commentator, if such an one really existed. The principle of *caveat emptor* has not, at least for the last half century, been understood in that ex-

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tensive sense which Judge Blackstone gave it, an exception to the rule has been already adverted to, as recognised in the case of sales of goods by sample, *Germaine v. Benton*, (3 Stark. R. 32; *Parker v. Palmer*, 4 B. & A. 387.) Another exception frequently recognised and well established is the case of *manufactured articles*. In a sale of such articles by the manufacturer, there is an implied warranty that they shall answer the purposes for which they are ordered. Chitty in his treatise on contracts, so declares the law; and Lord Tenderden in his opinion in *Street v. Blay*, recognises the existence of this distinction. "It is to be observed," says Lord Tenderden, "that although the vendee of a specific chattel, delivered with warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality; or fit for a certain purpose, and the article sent as such, is never completely accepted by the party ordering it. In this, and similar cases, the latter may return it as soon as he discovers the defect; provided he has done nothing more in the meantime than was necessary to give it a fair trial, (*O'Kell v. Smith*, 1 Stark. N. P. C. 107;) nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it."

It will be perceived that the Judge is speaking of the right to rescind a contract altogether, and thereby avoid the payment of any thing, and he is aiming to show the distinction between sales of specific chattels and contracts for manufactured articles, and whilst he clearly admits the existence of an implied warranty in this last class of cases, he, in another part of the same opinion which I have quoted above, allows the breach of this implied warranty to go to a reduction of the damages.

In this country, the decisions have been various and conflicting. In North Carolina, a partial failure of consideration cannot be given in evidence, but relief is said to be attainable by a distinct suit. *Washburn v. Pilot*, 2, Dev. R. 390. It does not appear, whether this doctrine is held applicable,

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when the consideration is affected by a breach of warranty as well as fraud, or whether it extends to actions brought on the original contract as well as those founded on the security. In Indiana and Virginia, Statutes have been enacted, authorising such defences, 2, Kent. Com. 474. In Ohio, the doctrine is the same as in North Carolina, but not having access to the Reports of that State, and merely taking the statement of chancellor Kent, I am not apprised of the grounds upon which these defences have been held inadmissible. In Kentucky, the courts have refused to allow a partial failure of consideration to be given in evidence, but compel the defendant to resort to his cross action. The courts of New-York have however adopted the rule, which we have seen, prevailed of late years in England, and have extended it to cases of fraud as well as breach of warranty. They have allowed this defence to be set up, whether the vendee has been sued for the consideration of a sale, or upon the security given for the purchase money, 4, Wendell 483, 8, Ib, 109, 2, Kent, Com. 473, and cases cited. So in Pennsylvania it is held, that the defendant may, by way of defence show a breach of warranty as to the quality of articles sold, without either returning them or giving notice to the vendor to take them away. *Steigleman v Jeffries*, 1, Serg. and Rawle 477. In Massachusetts, it was held, that where the defendant, without objection, accepted articles manufactured for him, he is not entitled, in an action brought against him for the price of the articles, to show in evidence that the workmanship was bad; but his remedy was by a special action on the case for the fraud and deceit in the workmanship, *Everett v Gray and others* 1, Mass. R. 101. In the subsequent case of *Tapt v. The Inhabitants of Montage* (14 Mass. R. 185.) ch. J. Parker observed in relation to the case of *Everett v Gray and others* "the law of that case has since been questioned; and we are certainly not disposed to extend it to cases not exactly similar. The ground of the decision was, that the gunlocks were accepted without objection, at the time. But if the grounds of the decision of the court in *Everett v Gray* were, as Judge Parker, supposes, the acceptance of the articles without objection, why

did the court go further and assert that the defendant had his remedy by a special action on the case? The decision obviously assumed that the defendant had his remedy, and that remedy was by a cross action. But I humbly conceive, that this decision is of but slight authority, because it does not appear from the report, whether the defendant had ever after offered to return the gunlocks or not. If he had, the decision conflicts with the entire current of both British and American authorities, if not, the circumstance of there being no objection to the articles at the time they were delivered, had nothing to do with the merits of the defence. The report of the case is a very meagre one, and it is entitled to no great weight.

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From this cursory view of the authorities, it will be perceived, that the uniform current of judicial opinion in England, at least since the accession of Lord Mansfield to the bench, has been in favor of the admission of proof of a breach of warranty in diminution of damages, where the contract has not been rescinded. In this country, the courts of the different states, as we have seen, have come to very contradictory conclusions. A large majority of them, if not all, have admitted the existence of a remedy in such cases, but require the party to resort to his cross action.— This idea was doubtless taken up from the ancient British authorities, and whilst in England since the commencement of the present century, it has been exploded as useless, expensive and inconsistent with the genuine spirit of the common law, our judicial tribunals have not kept pace with their neighbors across the water, but have adhered to a practice, which appears to be at least without any foundation in reason.

Let us examine for a moment the two points, from which, I apprehend, most of the difficulty and confusion on this subject has arisen.

First. The courts of England recognized a distinction between suits founded on the original contract and those based upon the security. Of the cases cited by Chitty in his treatise on contracts, confirmatory of this distinction, I have not been able to procure but one. The case of *Morgan v. Rich-*

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ardson cited in 1 Camp. 40, was a case, in which a bill of exchange had been given for the amount of the work, and money had been paid into court on the count upon the bill. In that case the defence was held inadmissible. It will be found, I have no doubt, that in all the other cases of this character, the security alluded to is *negotiable* or a *sealed instrument*. The principle of those cases has therefore no application to the case now before the court. The note here sued on is not negotiable, within the provisions of our statute, but is expressly declared subject to all the equitable defences which would avail against the maker. The holder of the note, under our statute, stands in the shoes of the maker; he is fully apprised, that he has purchased all the rights of the payee and no more, and such defences can be no surprise upon him. The promissory note gives the contract no new qualities, except so far as the statute of frauds is concerned, and I cannot see any good reason, why any additional rights should be claimed.

Secondly. This circuitry of action, which the courts of several of our states seem anxious to patronize, has been the next and chief obstacle in the way of an equitable settlement of this question. As early as the case of *Cornack v. Gillies*, (7 East. 480,) this doctrine was repudiated in England, and the court of common pleas in the case of *Street v. Blay*, (2 B. and A. 456,) recognized the validity of this determination. Some of the most respectable judicial tribunals in this country have adopted the same views. This has been the case in New York and Pennsylvania, and in Massachusetts; as we have seen, the later decisions lean that way. The remarks of Judge Marcy in the case of *McAllister v. Reab*, 4 Wendell 192, are appropriate and just.—"From an examination of the cases," says that judge, in delivering the opinion of the court, "I am satisfied, that in those where the damages arising from a breach of warranty in the sale of chattels, have been allowed to be given in evidence by the defendant, to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded on the ground that the express contracts were void by reason of fraud, and that the recovery was had up-

on a quantum meruit or valebant upon implied contracts, AUGUST TERM 1840. but upon a principle somewhat different from either of those adverted to in this case by the court below; upon a principle which has of late years been gaining favour with courts and extending the range of its operations. Such defence is admitted to avoid *circuity of action*. A second litigation on the same matter should not be tolerated, where a fair opportunity can be afforded by the first to do final and complete justice to the parties." Hence, the same court has held, not only that the defence is admissible, but that if the vendee chooses not to make such defence, when sued upon the contract, he cannot afterwards sue for the fraud or breach of warranty. So also Lord Ellenborough held, in the case of *Fisher v. Samuda*, (1 Camp. 190,) that after the purchaser had suffered the vendor to recover the price without making any defence, he could not maintain a cross action against him founded on the non performance of the contract.

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But it is thought that our Statute authorising defences of this sort to be made before justices of the peace, has some bearing upon the subject. The 7th, sec. of the 1st, art. of the act concerning justices courts contains the provision alluded to; that section provides that "on the trial of all suits upon contracts before any justice of the peace, or in any circuit court by appeal or otherwise, whether brought by the original claimant, or any persons for his use, or by the payee or obligee of any bond or note, or his assignee, it shall be the duty of said justice or court, to hear and determine such cause on its merits, and to hear parol or other legal evidence, to impeach the consideration or validity of any bond or note; and if it shall be ascertained by any justice or court or verdict of the jury, that the consideration of such bond or note has failed in whole or part, judgment shall be given according to the finding of the justice or court, or the verdict of the jury, notwithstanding the defendant may hold a warranty or other instrument of writing on the payee or obligee of such note or bond, purporting to be an agreement to make good the consideration of said bond or note, if the same should fail." It is thought that the Legislature by making this provision applicable only to suits be-

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fore justices, tacitly excluded the inference that it would be applicable to superior courts.

I entirely concur in this construction, and never supposed that this was the law or ought to be the law in actions in the superior courts. Whilst I do not profess to be able to explain the full bearing of this enactment, unless I was at liberty to refer to its history with a view to ascertain the particular evil which it was designed to remedy, it is at least sufficiently obvious that it has no bearing upon the principle, which I am disposed to maintain. It not only embraces actions upon contracts, but upon bonds, it is not limited to contracts for personal property, but may embrace contracts in relation to land; it not only applies to sales of specific chattels, but to sales of manufactured articles; and all this where the opposite party holds a written instrument of warranty, certainly I never supposed that this was the law, until the Legislature so declared it, and I should be very far from extending its operation to cases in the circuit court, for which it never was designed.

It is also suggested, that this defence might fall within the jurisdiction of a court of chancery. I do not understand, that a court of chancery has any jurisdiction, in a case, where the remedy is complete at law. Whether defences of this kind be admissible or not, under the general issue in assumpsit or debt, it seems to be conceded even by those judges, who refuse to allow the matter to be set up by way of defence, that the party's remedy is by cross action on the warranty or for the deceit. There is nothing, therefore, in either event to require the interposition of the Chancellor.

It has been lastly urged at the bar, that if this defence be admissible, there should be at least some notice given to the opposite party. This doctrine is reasonable enough in itself, and I see it has prevailed in New York, though I have seen no mention of it in any English case. If the pleadings in assumpsit and debt were now for the first time to be settled by adjudication, the objection to such defences without notice would have great weight. But since the thousand defences have been allowed in these actions, which have no

the remotest affinity to any idea conveyed by the general issues of non assumpsit and nil debet, and these defences have prevailed for centuries, without objection, it is too late now to require an exception to be made against the admission of the defence proposed in this case.

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I conclude then, that the real question should be, whether the defendant has any remedy, after accepting the warranted articles, or whether he has by retaining the property, waived the defects. If he has any remedy at all, and the retention of the articles be no waiver of the fraud or breach of warranty, that remedy should be available in the suit brought by the fraudulent warrantor. There is no necessity of having two actions to settle what can be as well settled in one. That the party, by retaining the warranted property, does not waive any rights, seems to be admitted by all the cases which I have seen.

The defendant, Ferguson, in this case, having contracted for a carriage that would answer for a mail coach, after receiving the same, had a reasonable time to ascertain whether that carriage was made in accordance with the contract or not. If the defendant ascertained that the carriage was unfit for the purpose designed, he had a right to return the same to the vendors, and upon such return, or an offer to return, the contract would be rescinded, and these facts would have constituted a complete bar to their recovery upon the note. Having however, retained the carriage and thereby affirmed the contract; he had still a right to give the fraudulent making of the carriage or breach of warranty, in evidence to diminish the damages.

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35a	358
6	426
53a	603
6	426
132	197
6	426
137	269

LISLE V. THE STATE.

1. A person indicted for a capital offence may waive his right to a copy of the indictment, and if he pleads and goes to trial without making objection for the want of such copy, he cannot object after verdict.
2. The incompetency of a juror is no ground for a new trial, when such incompetency was known to the party before the juror was sworn in chief, and no objection was then made.

Appeal from Howard Circuit Court.

Clark and Davis Counsel for Appellant.

It is contended in behalf of the prisoner, that a new trial should have been granted, (after setting aside the verdict of the jury) by the circuit court, for divers reasons: The first of which is, that no copy of the indictment was furnished the prisoner or his counsel, before the trial in the circuit court; see Rev. Statute, page 485, sec. 1.

It is not a waiver of any of the legal rights of the prisoner, that he went to trial without demanding a copy of the indictment. See 18 John. Rep. page 212. *The People vs. McKay.*

The next point is, had the prisoner a trial by an impartial jury as prescribed by the constitution? See page 27, Declaration of Rights, sec. 9, (in Statute book.) Also see Statute page 490, secs. 11 & 12. Whatever is good cause of challenge to a juror, if not discovered till after verdict, is good ground for a new trial. See *Vance vs. Heaslet*, 4 Bibb, 191. *McKinley vs. Smith*, Hard 167. *Pierce vs. Bush*, 3 Bibb 347.

The affidavit of David Morrow, a juror, was improperly received by the court below, on the motion for a new trial to prove that he was an impartial juror. See *Vance vs. Heaslet* 4 Bibb 191.

J. M. Gordon (Cir. Att'y.) Counsel for the State.

As to the first point presented, I insist that the law is well established that the affidavit of a juror cannot be received after he has consented to the verdict to explain the reasons or grounds either of law or fact, upon which he found his verdict, for the purpose of impeaching or setting it aside. See 1 Hen. & Munf. 385. Hardin Rep. 586. 4 Johnsons Reps. 487. 3 J. J. Marshall's Rep. page 495.

The second point is equally well established, that although the affidavit of a juror cannot be read to impeach his verdict, it is always competent for the purpose of supporting and sustaining his verdict, 4 Johnson's Reports 487. 3 J. J. Marshall's Reports, 395. AUGUST TERM.
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The third point is as to competency of David Morrow, as juror. I insist that although he had formed and expressed an opinion, yet as that opinion was founded on rumor, and was not such as biassed or prejudiced his mind, he was a competent juror. Revised Code p. 490, sec. 11. By that section of the law, the juror is necessarily made the judge whether he has bias or prejudice on his mind.

But, in regard to the fourth question, admitting that Morrow, the juror, was incompetent, and that there was cause for challenge to the juror, yet as the prisoner had full knowledge of the fact, when the juror was sworn on the voir dire and he neglected to interpose his right of challenge, either for cause, or peremptorily, he cannot avail himself after verdict, of the incompetency of the juror. 3 Marshall's Reps. 330. 1 Binney 27. 4 Bibb 272. 4 Littell's Rep. 118. 4 Bar. & Alderson 430. 8 Bar. & Cris. 417.

My answer to the fifth point presented is, that the Statute which requires the clerk of the court to deliver to the prisoner or his counsel a copy of the indictment, at least forty-eight hours before he shall be arraigned on the indictment, is merely directory. See Rev. Code page 485, sec. 4, article the fifth, under the head of Practice and Proceedings in criminal cases, and that the prisoner waived his right to a copy of the indictment, by pleading and going to trial without objection. It is too late after verdict for the prisoner to complain that a copy had not been furnished him or his counsel before the trial. Foster's Crown law, 229 & 30. Chit. crim. law page 405. 1 East pleas of the crown, 112 & 13. 3 Howard's Rep. 429. 1 Mo. Rep. 717. 7 Wendell's Rep. 417; by going to trial without objection he admitted that he had a copy sufficient for the purposes intended by the law, or that he had no defence to set up, which required the inspection of a copy.

As to the sixth point. I insist that as the evidence has

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not been saved, by the bill of exceptions, this court will not undertake to decide whether the court below committed error, in not giving the instructions asked by the circuit attorney, but will presume that the court below did right until the contrary is made to appear to this court.

Opinion of the Court by Napton, Judge.

The appellant was indicted for the murder of one Hiram Wilson, was tried and convicted of murder in the first degree. The prisoner filed his motion for a new trial, and in support of said motion introduced certain affidavits. The affidavit of Mr. Tracy stated, that on the morning of the day on which the trial of Lisle commenced, he saw David Morrow (one of the jurors) in the street, near his house, and enquired of him what was done with Lisle, who answered that he did not know he ought to express any opinion—but remarked that it did not make any difference, as he supposed all the jurors had made up their opinions. That he had made up his opinion and was for hanging Lisle. This was, as the affiant believed, said in reply to the father of witness who was in his company. This affidavit was corroborated by another affidavit of Ellery Tracy, the father of the first affiant, who deposed substantially to the conversation with Morrow, as the first affiant had represented it. The affidavit of William Kanes was also introduced, who deposed that about a week before the term of the court at which Lisle was tried, David Morrow was at his house, and had a conversation with the affiant about the probable guilt of said Lisle, in which conversation, Morrow among other things said that "Lisle was a fool for not running away when he was out of jail, for if he was not hung, it was useless to have laws or a jail."

The affidavit of the prisoner was also read, which stated that at the time the jury were sworn, he had no knowledge that Morrow, one of the jury, had before that time expressed an opinion, as to the guilt or innocence of the affiant, but had never ascertained that fact, until after the verdict of the jury was rendered.

The State then offered the affidavit of Morrow, the juror,

who declares that after he had been sworn to answer questions, he, with others was asked whether he had formed or expressed an opinion in relation to the guilt or innocence of the accused, to which he replied that he had, but that his opinion was founded on rumor only. The affiant further stated, that that opinion had not been formed from any thing he had heard from any witness in the cause, or from any personal knowledge of the facts—that that opinion had no bias or prejudice on his mind in rendering his verdict, but he made up his opinion from the facts in evidence, and moreover that he entertained no ill will or malice against the accused.

So much of this affidavit as related to what the juror had stated on his examination was admitted to be read; but the remainder was excluded.

It also appeared in evidence, on the motion for a new trial, that no copy of the indictment had been given to the prisoner, or his counsel, before ordering the trial of this cause, nor had any been demanded by the defendant or his counsel, nor had any objections been made to going into trial for want of such copy.

On this evidence, the court overruled the motion for a new trial, and the defendant appealed to this court.

1. The first ground upon which the appellant seeks a reversal of this judgment, is the failure of the clerk to furnish him or his counsel with a copy of the indictment, forty eight hours before he was arraigned.

This duty is imposed upon the clerk by our statute, (Rev. Co. 465,) and is obviously for the purpose of enabling the defendant to prepare his defence. If the clerk neglects his duty in this particular, the defendant had undoubtedly a right to delay his trial, until the statute was complied with; but if he pleads without such copy of the indictment, and makes no objection for the want of such copy, can he after verdict, claim a new trial for this cause? I think not. The Supreme Court of Mississippi thought not, under a similar statute and under a similar state of facts, (3 Howard Rep. 429,) and sustained their opinion upon common law authorities as well as upon principle. In England, the defendant is entitled to a copy of the indictment and caption, upon de-

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mand, and yet it has been held, that though demanded, if the party goes into trial without such copy or with an imperfect copy, he cannot object after verdict. Chitty crim. law 405. Foster crim. law, 229-30. 1 East. pleas of the Crown, 112, 113. The right of the defendant in England, after a demand of the copy of the accusation stands precisely on the same grounds, which they do under our statute without any demand, and the opinion of Foster and East and Chitty is conclusive on this point so far as the adjudications in England are concerned.

The case of the People v. McKay, (18 Johns R. 212,) has been supposed to conflict with this position. In that case, the court decided, that where a prisoner was tried at a court of Oyer and Terminer and goal delivery for murder and convicted, without a venire returned and filed, it was necessary to arrest the judgment and grant a new trial. The opinion I apprehend is not at all apposite. The grounds of that decision as appears from the opinion of Judge Spencer, were, that the process of venire was indispensibly requisite at common law, and by the statutes of that state; that this process must be regularly returned, and the process itself, together with the return, must be on the record, and its omission is an error *apparent on the face of the record*: of course under such circumstances, the court could do no otherwise then arrest the judgment, however technical or formal the objection.

In the case now before the court, the objection is not merely technical, but is founded on matters in pais. The order upon the clerk, if any had been made, for a copy of the indictment, would have formed no part of the record, its omission cannot appear by the record. No prejudice to the prisoner can be shown to have resulted. There is nothing therefore of strict technicality, which has not been waived, and no merits in any other respect, which could induce the court to grant a new trial.

2. The only other question for consideration, is the propriety of refusing to grant a new trial in consequence of the alleged incompetency of one of the jurors. Whether this

juror was incompetent or not, I do not think it necessary, in this case to determine. It has been suggested in argument, that the section of our statute, (Rev. Co. 490, § 11,) which provides that a juror, who declares on his voir dire that he has formed and expressed an opinion, may nevertheless be sworn, if that opinion be grounded merely on rumor, and is not such as could bias or prejudice his mind, is an evasion of the constitutional requisition, which declares that every offender shall have a fair and impartial jury. It is supposed, that a juror, who has formed an opinion, no matter from what sources of information, is not such an *impartial* juror as the constitution contemplates. It may be said however in relation to this, that it might be a nice point in metaphysics to determine how far the mind was compelled to assent to or dissent from the truth of a supposed state of facts, when presented to its contemplation, and that for the ordinary purposes of life, we are well assured, that an opinion or rather inclination of the judgment, founded on a supposed state of facts, when it is unaccompanied with any prejudice or ill will to the parties concerned, will very readily be removed and changed, by the presentation of a different state of facts, and the person whose judgment is invoked is as capable of doing justice as though he had never heard any incorrect or imperfect statements in relation to the matter. However this may be, it is of no consequence for the decision of this case, whether the juror was incompetent or not. If the juror was incompetent, and that incompetency was known to the defendant before the trial, he cannot now seek to reverse the judgment on that ground.

This is not only consistent with justice, but amply sustained by the authorities, without, so far as I have been able to discover, a dissenting voice. 3 Marsh 330. 1 Binney 27. 4 Bibb 272. 4 Littell 118. The case of Bell v. Howard is directly in point. The court said, in relation to such an objection, "It is apparent, that when the juror was called on the trial, he disclosed the fact of his having made up an opinion before he was sworn. Bell should therefore have objected to the juror before he was sworn, and having failed to

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The incompetency of a juror is no ground for a new trial, where such incompetency was known to the party before the juror was sworn in chief; and no objection was then made.

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do so, it was too late after trial, to make the incompetency of the juror a ground for a new trial, 4 Litt. 118.

The consequences which would follow any other doctrine seem indeed too monstrous to be tolerated. I apprehend, on this point, there can be no difference in the rule in civil and criminal cases, and if in civil cases, either party may receive incompetent jurors, and after taking the chances of the opinion of the juror being in his favor, make it a ground for reversing the verdict, when it is discovered to be otherwise, there could be no end to litigation.

It has been urged however, that the answer of Morrow, the juror, to the double interrogatory propounded to him, being general, might have been applied by the defendant to either branch of the question, and he might have been understood by defendant to have *formed* an opinion, but not to have expressed one. If the answer of the juror was equivocal, it was the duty of the defendant to have obtained a more satisfactory one, at the time. He had ample power for so doing, and in the event of a remaining dissatisfaction, he had his peremptory challenges, by which the juror could have been disposed of. Our law, in tenderness to human life, has thrown most ample guards around the accused; it not only yields to every just requisition, but allows much even to the whims and caprices of the defendant, so that not only an impartial public may concur in the justice of his sentence, but even the prisoner himself may be satisfied, that all his fancies have been consulted, in the choice of his triers. Counsel are assigned him to enable him judiciously to use all these advantages. If however he will voluntarily waive these privileges, he cannot afterwards complain of his own laches. Judgment affirmed.

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If a witness is sworn and gives some evidence, however formal or unimportant, he may be cross examined in relation to all matters involved in the issue.

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vs
Kankey,

Appeal from Cooper Circuit Court.

P. R. Hayden counsel for appellant.

1st. That the Court erred in refusing to permit the defendant to cross-examine Childs, as he proposed to do after he had been sworn in chief by the plaintiff, 4. Wendell's Rep. 369, Jackson on the demise of Lowell vs Parkhunt, see 1. Phillip's E. 228, old edition, 273-4, Cowan's Edi. 2. Wendell 166, same book 583, 5, Mass. 334-5-6, 11, Dicking 273-4.

2nd. That the plaintiff did not take issue, to the plea of set-off, nor did the Jury find the same, which was left undisposed of, and therefore the court erred in rendering judgment upon the finding of the jury upon the plea of non-assumpsit, see Roland agt. Sargeant 1. Mo. R. 437-S.

Adams & Miller, counsel for appellee.

1st. That the witness, Childs, was properly sworn in chief, as there is no other mode of swearing witness to testify except where the witness is a party to the record, see Jackson vs Parkhunt 4, Wendell Rep. 370.

2nd. That when the defendant below proposed to cross-examine Childs, in relation to a matter about which he had not been examined by the plaintiff below, he thereby made him his own witness, and being an interested witness, he was properly excluded by the Court, see 2, Caines Rep. 178.

3rd. That there was no motion by appellant for a new trial or an arrest of judgment and consequently the judgment of the Circuit Court cannot be disturbed, 4. Mo. Repts. 540. Poke vs The State, Davidson vs Peck Ibid. 445.

Opinion of the Court by Napton, Judge.

Kankey sued Page in assumpsit, to which defendant plead non-assumpsit and set-off. Issue was taken on the plea of non-assumpsit, verdict and judgment for plaintiff.

On the trial, plaintiff introduced one Childs as a witness,

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51a	50
6	433
56a	540

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If a witness
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who testified on his voir dire that he was interested in the event of the cause, in favor of Page.

Notwithstanding, plaintiff examined him and proved by his testimony, the signature of said Page to certain letters, which he wished to read to the jury. Page the defendant, proposed to cross-examine witness, in relation to other matters involved in the issue, but the court refused to permit the witness to be examined in relation to any point except the signature of said letters by Page. The defendant excepted to the opinion of the court, and this is all the error relied on in this court.

The rule on this subject is clearly laid down by Phillips in his treatise on evidence. "If a witness is called by a party, merely for the purpose of producing a written instrument, belonging to the party, which is to be proved by another witness, he need not be sworn; and if not sworn, he will not be subject to cross examination. If a witness is sworn and gives some evidence (as proving an instrument) however formal the proof may be, he is to be considered a witness for all purposes; and this although he may be substantially the real party in the suit, and the party on the record a mere nominal party." p. 274, Cowans Ed.

This is amply supported by adjudicated cases. 4, Wendell 369, 2, Wendell 166, 11, Peck 273.

The reason of this rule is obvious and, I think, satisfactory. If a party voluntarily calls upon an interested and in competent witness, for the purpose of sustaining by his testimony something favorable to his side, he admits that the witness is above the reach of improper influences, and his adversary, it would seem just, should have the full benefit of such admission.

The court should have allowed the examination proposed, and for this error, the judgment must be reversed.

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1. A suit instituted without any authority from the person in whose name it is conducted should be dismissed; and upon a suitable suggestion of facts, the Attorney will be required to show some authority either verbal or written, for conducting the suit.
2. A witness cannot, by contumacious behaviour, deprive a party of the benefit of his testimony, if there be no laches or connivance on the part of the person who has a right to his testimony: Therefore, when a witness who had been sworn in the cause, and ordered by the court to keep without the hearing of the witnesses under examination, disobeyed the order and remained within hearing, and this without the consent or connivance of the party to the suit, such party did not thereby lose the benefit of the testimony of such witness, and the Circuit Court erred in refusing to permit the witness to give testimony in the cause.

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32a	90
6	435
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124	536

Appeal from Boon Circuit Court.

Leonard, counsel for Appellant.

1st. The proceeding in the name of Wilson ought to have been dismissed, because it was commenced and carried on without his authority, knowledge or consent. *M'Alexander vs Wright 3, Monroe Rep. 189. Robison vs Eaton, 1. term Rep. 62, opinion of justice Van-Ness in Denton vs Noyes C. John, Rep. 306 and cases there cited.*

2nd. Wilson ought not to have been excluded as a witness *Parker vs M'William 19, Eng. Com. L. R. 204. Beaumont vs Ellice 19, Eng. Com. and R. Cond. 538. Rex vs Colly, M. and M. 399, and Rex vs Brown, both cited in note to Beaumont v Ellice 19, Eng. Com. L. and Rep. cond. 538. Cook vs Netherton 25, Eng. Com. and R. cond. 627. Do. Ex. Dem. Good vs Cox In R. B. 30 Geo. 3, cited in note to last mentioned case.*

Kirtley counsel for Appellee.

1st. The Circuit Court committed no error in overruling, at the August term 1839, Keith's motion to refuse leave for Wilson's interpleader to be proceeded in.

C. J. R. 34. Smith vs Stewart and Do 296. Denton vs Moyes 1. Strange 693, Lorymen vs Hollister Cro. Jac. 695. Alleby vs Colly 1. Binney R. 214. 479, 7. Pick, R. 137. Smith vs Bowditch.

2nd. The Circuit Court committed no error in refusing to permit the witness Wilson to give evidence. 1. Stark. Ev.

AUGUST TERM 1840. 163. C. Bingham 683. Parker vs M. William 4. Carrington and Bayne 585. Beaman vs Ellis, 1. Ry. and M. 430, 1. Woody and Malcom 329, 3. Stark E. 1733. 1. Phi. Ev. 268.
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Opinion of the Court by Napton Judge.

Keith commenced an action of debt against Elisha Lambert in the Boon Circuit Court, returnable to the November term 1838, and attached, upon making the necessary affidavit, three slaves and other personal property, as the property of Lambert.

At the return term, leave was given to James Wilson to interplead in the cause, and an interplea was accordingly filed, claiming the property levied on, upon which issue was taken.

At the April term 1839, the cause was continued at the instance of Keith, and afterwards at the August term 1839, before the trial came on, Keith moved the court to refuse leave for the interpleader to be further proceeded in, because the said proceeding was instituted without any authority from James Wilson, and without his knowledge or consent. In support of this motion, Keith read his own affidavit which set forth the following state of facts.

The property attached, originally belonged to one Nancy Vanlandingham, who intermarried with one James Wilson, sometime in the spring of 1831. Said Wilson came to the State, only a few months previous to his marriage. Wilson lived with his wife a few days, and then left the State, under pretence of going to Ohio to procure some property, which he alledged had been left him by his father. Previous to his marriage with Miss Vanlandingham, the affidavit states, Wilson had intermarried with a Miss Allen of Ohio, who had ever since been his wife, was still living, and by whom he had several children. Some years after Wilson left this State, Nancy Vanlandingham intermarried with Lambert, the defendant, and died, leaving by him one child, her only heir at law. The property in question, is claimed by Wilson, by virtue of his marriage with Miss Vanlandingham, Wilson has never been in the State since his abandonment

of this lady, and the affiant avers, that the proceeding is carried on in his name, without his knowledge or consent.

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In opposition to this motion, the affidavit of Merritt Vanlandingham was read, which denied the validity of Lamberts marriage, but did not allege any authority from Wilson, or deny his non-residence. It was also shown, on the hearing of this motion, that Todd & Kirtley, whose names were signed to the interplea, were licensed attorneys of the Boon circuit court. The circuit court overruled the motion to dismiss. On the trial of the cause, the court, on the application of Keith, directed the witnesses to absent themselves from the court house so as to be without the hearing of those under examination. Evidence was then given on behalf of the claimant, conducing to show that he had come into possession of the property attached by his intermarriage with Nancy Vanlandingham in 1831, and that after living with her a short time, he left this State, leaving the property in her possession.

Keith then, read depositions to show that previous to Wilson's marriage with this lady, he had intermarried with a lady in clermont county, Ohio, and that his wife, in Ohio, was living at the time of the second supposed marriage, that he had never been divorced &c. The object of the testimony was to identify the Wilson of Ohio, who was married to Miss Allen, with the Wilson who married Miss Vanlandingham. For this purpose, appellant offered to introduce one Alexander Wilson, who had been sworn and charged under the order of the court to keep without the hearing of the witnesses when examined. Counsel for the claimant objected, and showed that this witness had disobeyed the orders of the court, by taking a seat near the door, and had heard much of the testimony on the question of identity, the material question on the issue. It was admitted that neither Keith or his counsel consented or connived at this conduct of the witness. The court refused to let the witness be examined; after other testimony was submitted to the jury, a verdict was rendered for the interpleader. A motion was then made to set aside the verdict, because of the exclusion of the witness Alexander Wilson.

AUGUST TERM. 1840. On the hearing of this motion the affidavit of Wilson was

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read, who denied any intentional disobedience to the orders of the court, and avowed that he had taken his seat within hearing of the witnesses under examination, without the direction of Keith or his counsel, and under a misapprehension of the object of the order. The affidavit of Keith in relation to the materiality of the testimony of this witness was also read. The court overruled the motion for a new trial and exceptions were duly taken.

The questions presented to the consideration of this court, are first, did the court err in refusing to dismiss the interpleader, for the causes alledged, and secondly, was the witness, Alexander Wilson properly excluded, 1. the effect and validity of a judgment, obtained by the appearance of an attorney, without any authority, has been variously determined by the courts, both in England and this country. Whether the judgment be absolutely void, and no bar to a subsequent action, or whether the judgment must stand, and the remedy of the losing party is against the attorney of record, is not, I think very satisfactorily settled by adjudged cases. In the case of Denton and others v. Moyes (6 Johns, R. 296,) it was held by a majority of the court that a judgment obtained by confession, without any authority from the defendant to the attorney who confessed the judgment, was so far regular that the lien acquired by the plaintiff should not be disturbed, but it might be opened for a trial on the merits. Such judgments were also held to be invalid, where there was collusion between the attorneys on both sides, or where the attorney, who assumes without authority to act for another is irresponsible. His position seems to be in accordance with the authority in 1. Salk 88, where the court said that "if the attorney be a beggar or a suspicious character, the court will set aside the judgment; for otherwise, the defendant has no remedy, and any one may be undone by that means." This criterion, by which the validity of a judgment obtained under such circumstances is to be vested, Mr. VanNess, who dissented in that case from the majority, considered a very unsafe one.

The case of Robson v. Eaton, (1 Term R. 62,) is more ap-

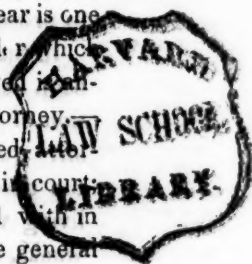
plicable to the principle involved in the case now under consideration. In that case, an attorney instituted a suit under a forged warrant of attorney, judgment was obtained and the money paid over to plaintiff's attorney. The court of King's Bench held that in a subsequent action, brought by the plaintiff, the first judgment and payment under it, to an unauthorized attorney was no bar. But I do not conceive it necessary for the court to determine in this case, whether a judgment obtained under such circumstance be valid or not.

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The only question here is whether, if the court discover that the proceedings are instituted without any authority from the person in whose name they are conducted, they should not be dismissed. On this question I entertain no doubt. If the current of decisions favors the validity of a judgment so obtained, there is the greater necessity that when the absence of all authority is discovered, the proceedings should not be allowed to proceed to judgment.—The remarks of the Supreme Court of Kentucky, when deciding this very point, in the case of *McAlexander v. Wright* (3 Monroe R. 192,) are forcible and just. It was contended in that case, as it was in this, that the attorney's license was a sufficient warrant to authorize the court to consider the proceedings as properly instituted. The court observe on this point, "The right to be employed and appear is one thing; this is proved by the license, and the law under which it was granted. The fact of being actually employed is another matter, and is proved by the warrant of attorney. In England, from which our jurisprudence is derived, attorneys must have a general license and an admission in court; yet the warrant of attorney could not be dispensed with in cases where it was properly demanded. And the general license was not intended to reach further in this country."

A suit instituted without any authority from the person in whose name it is conducted should be dismissed; and, upon a suitable suggestion of facts, the attorney will be required to show some authority, either verbal or written, for conducting the suit.



It will be observed, that in Kentucky the court held, that a warrant of attorney was necessary, when properly demanded, because the laws of Kentucky had never dispensed with the necessity of such warrants, but the principle of the decision will justify us in saying, that in this State where warrants of attorney have been dispensed with by sta-

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tute, a party may still upon a suitable suggestion of facts, require the attorney to show some authority either written or verbal.

The question remains, then, whether in this case the party laid a sufficient ground to justify the court in ordering the attorneys of record to show their authority.

The affidavit of Keith established that Wilson, the interpleader, had left this state nearly ten years before the institution of the proceedings in his name, and had never returned; that previously to his marriage with Miss Vanlandingham he had a wife in Ohio, living at that time and alive yet, and that Wilson had no knowledge of the proceedings carried on in his name whatever. The fact of Wilson's absence from the state was admitted, and his marriage and desertion of Miss Vanlandingham. Nor was it pretended, that the attorneys had any authority from Wilson. Other matters were charged however and supported by affidavit, which had no bearing on the question then at issue.

In the case of McAlexander v. Wright, the affidavit set forth that Wright the plaintiff, had long since left Virginia and gone to Florida or some of the then Spanish dominions, and had never been heard of since, and that from this and other circumstances, affiant believed him to be dead, and that he verily believed, that Wright had given no authority to prosecute this suit to any person, &c.

In that case the absence of Wright and his never having been heard of was thought, by the court to raise a presumption of his death, and in that way the rights of the defendant would be jeopardised. In the case before the court, the absence of Wilson for nine years and upwards, after living with his supposed wife, in this State, for only a few weeks, it was not pretended, raised any presumption of his death, but it raised a presumption as fatal to the interests of Keith, and might well constitute a reason why some authority from him should be produced.

But it is thought, that in this case the motion came too late. Two continuances had taken place and an issue was joined on the interpleader, before the motion for dismissal was made. I cannot see how this question has any bearing

on the merits of the motion. If the interest of Keith alone were involved, his laches might perhaps forfeit his legal rights, but the court was bound to protect the interests of Wilson as well as Keith, and if at any stage of the proceedings, a presumption was raised, that no authority from Wilson existed, it was the duty of the court to arrest the proceedings, unless that presumption was rebutted.

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2. The propriety of excluding the witness who had disobeyed the order of the court, is the only question remaining to be disposed of. This rule, it appears from all the authorities, is not an inflexible rule, but the exclusion of a witness under it must depend somewhat on the discretion of the court. The circumstances which must control this discretion are well settled. If it appears that the witness has disobeyed, by the consent or procurement of the party, the court may very properly exclude him. *Dyer v. Morris*, 4 Mo. R. p. In some cases, where the witness has been contumacious and purposely transgressed the order, this circumstance has been held sufficient to justify the court in excluding him. But I have seen no case, in which it appeared that the disobedience of the witness was owing to his misapprehension of the object or nature of the order, and where neither the party or his counsel were privy to such disobedience, in which the court has been held warranted in excluding the witness. Indeed, if such an inflexible rule did exist in any of the courts of this country, it might well be questioned whether it would not be sounder policy to sacrifice the practice altogether, rather than endanger more vital principles than can be involved in the blind adhesion to a rule of court, however reasonable and right in ordinary cases.

A witness cannot, by contumacious behaviour, deprive a party of the benefit of his testimony, if there be no laches or connivance on the part of the person who has a right to his testimony: Therefore, when a witness who had been sworn in the cause, and ordered by the court to keep without the hearing of the witnesses under examination, disobeyed the order and remained within hearing, and this without the consent or connivance of the party to the suit, such party did not thereby lose the benefit of the testimony of such witness, and the Circuit Court erred in refusing to permit the witness to give testimony in the cause.

A witness cannot deprive a party of the benefit of his testimony by any contumacy of his, if there be no laches, or connivance on the part of the person who has a right to his testimony. The court is invested with ample powers to punish such contumacy and enforce its orders, and will it be intended, that a party is bound to watch his witnesses to prevent their misconduct? The suitor has no extraordinary powers to enforce his wishes, nor is it, I apprehend, his duty

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to exercise more than ordinary diligence. If the misconduct of the witness comes under his notice, it would be, undoubtedly his duty to present the matter to the court, but the affidavit of Keith in this case negatives that fact, and the affidavit of the witness establishes that there was no wilful contumacy. Under these circumstances, I do not see, how the court has any right to deprive Keith of the benefit of this testimony.

The fact that the witness heard a portion of the testimony, contrary to the orders of the court, may go to affect the credibility of the witness, and would undoubtedly be a proper subject for comment before the jury; but it cannot affect his competency.

The consequences that would result from any other doctrine, seem to me well worthy of consideration. If a witness' contumacy be a sufficient ground to warrant the court in excluding him altogether, notwithstanding it appears that it was through no connivance or default of the party to the suit, an unavailing and reluctant witness might, by wilful and intentional disobedience to the order, at any time deprive the party of the benefit of his testimony. And yet it is not only reasonable and just, but it is well settled by authority, that a witness cannot by making a bet or doing some other act to disqualify himself, deprive the party of his testimony.

For these reasons, the judgment of the circuit court should be reversed.

SMITH V. SHAW.

Appeal from Ray Circuit Court.

A. Rees, counsel for Appellant.

1. That they may impeach the consideration of this bond either in the whole or in part, and that, by parole testimony see revised Statutes p. 359-60, section 7.

2nd. That the justice having by law, chancery jurisdiction the circuit court, on appeal, had the same, and should have decided the case upon the principles of chancery adjudications, and if so, the law is clear and well settled see Sugden

on Vendors, 382, 3, and (note 200) in points. Sug. 166, directly in point, see sug. (208, note 113.)

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Davis, counsel for appellee, cited.

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Merdecia Lane v E. Price, 5, vol. Decisions of this court p. 101. and cases there referred to.

Opinion of the Court by Tompkins, Judge.

Shaw sued Smith before a justice of the peace on a note. The justice gave judgment against Shaw, and he appealed to the circuit court. That court gave judgment against Smith, for seventy dollars, a balance due on the note, after deducting payments made.

Smith offered evidence to prove that the note was given in consideration of land sold by Shaw to him, and the deed produced in evidence showed that Shaw had sold him several tracts of land without specifying the quantity of land each contained for the gross sum of seven hundred and seventy dollars.

No evidence was offered to prove that the note formed any part of the consideration agreed to be paid for this land; and the court refused to permit him to prove a verbal agreement, that if the land on survey did not hold out in quantity with the reported contents of the surveys, made under the authority of the United States, in such case, Smith was to have an allowance for the deficiency, on his notes.

As Smith did not prove the note was given in consideration of the land, it is entirely useless to enquire whether such an agreement would be good under the Statute of frauds. It is not attempted to be proved that the note was obtained by means of any fraudulent representations made by Shaw.

This judgment of the circuit court ought to be affirmed, and, Judge Napton concurring, it is affirmed.

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MOORE & PORTER impleaded with REA & HUSTON, v.
M'CULLOCH.

Moore & Porter impleaded with Rea and Huston.
v.
McCullough.

It is error in the Circuit Court to refuse to grant a continuance when a good cause is shown.

Appeal from Cooper Circuit Court.

Hayden, counsel for Appellants.

1st. That the Circuit Court erred in suppressing the deposition of Samuel Williams taken by defendants on the 18th of February 1840, and filed in this cause. sec. 1. Philip's Ev. 226. 2, Cains Rep. 131, Steinback vs Columbia Insurance Company. 1. Stark 2. part 127-8-9. 2. That the court erred in refusing defendants a continuance of the cause for the want of the evidence of said Williams contained in the deposition.

3rd. That the court erred in refusing defendants leave to read the deposition of Luther Carter and in rejecting the evidence of others offered by defendants to show that the bill of items of work done by complainant and Huston was too high, and that they were not fair, and much higher than customary for similar work.

4th. That the finding of the court was contrary to law, equity and the evidence given in the cause, and that the decree is one sided, and not against all the defendants in the cause; and

5th. That the court erred in overruling the defendants motion for a new trial of the cause, sec. 1. Maddox chancery 405-6-7. Story's Equity 2. vol. 41, 47, 53, 1. Peters digest 184, § 175, 5, Peters R. 276, Cathcourt and al vs Robison, 3, Cowen 504. &c. Seymore vs Delaney, 2 Cowen 139.

W. Adams, counsel for Appellee.

1st. That the court did not err in suppressing the deposition of Samuel Williams. see Nowlin v Foster 4. Mo. R. 21.

2nd. That the court did not err in refusing to grant a continuance.

3rd. That Huston was properly received as a witness. see 1. Phil. Ev. 63, in notes (1. Johns Rep. 556-576-7. Beebee and others v. Bank of New York. Trustees of Huntingdon v Nicoll 3, J. R. 566.

4th. There was no foundation laid in defendants answer to ^{AUGUST TERM} 1840. open and surcharge the settlement alleged in the amended bill.

5th. That the settlement was conclusive, and could only be opened upon the ground of fraud positively charged and proved, or for errors or mistakes specifically set forth and alleged in the answer. *Fonblanques Eq. 32 and 39, in notes. 1st. Mad. Treatise 102-3. Com. on Con. 473. in notes. 2. Marshall 338, 2. Stark. Ev. 18-19. Stoughton v. Lynch, 2. J. Ch. R. 217. Slee v. Bloom, 20. J. R. 689. 1. story Eq. 497. 501. James v. M'Kennon, C. J. R. 559. Lyon v. Talmage, 14. J. R. 516, side page.* ^{Moore & Porter impleaded with Rea and Huston. v. McCullough.}

6th. That the evidence rejected by the court was irrelevant to the issue.

Opinion of the Court by Napton, Judge.

McCullough filed his amended bill on the chancery side of the Cooper circuit court, at the November term 1838. The substance of the original bill and answer, together with the disposition, by the circuit court, of the issue first made in that court, may be found in the opinion of this court, contained in 5. vol. Mo. Rep. p. 141. By the amended bill, it was represented that James Huston contracted with the defendants Moore and Porter to do the carpenters work on a certain house, and that after making said contract, the complainant McCullough entered into partnership with said Huston in the execution of said work—that the said work was done and its value amounted to \$1189: that after the completion of said work complainant and Huston came to a settlement with Moore and Porter, and it was agreed upon by all the parties aforesaid, that one half of the said sum should be paid to said Huston and the other half to complainant; and it was further agreed, that the sum of three hundred and forty dollars, for which said Moore and Porter held the complainants bond, should be applied to the discharge of complainants half, which sum of three hundred and forty dollars was in consideration of a lot sold by Moore and Porter to complainant; and Moore and Porter executed their note to complainant for the balance. The

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bill charges that the difference so found due was paid by Moore and Porter, and that the said Moore and Porter retained in their hands the sum of three hundred and forty dollars, in payment and satisfaction of the said obligation, mentioned in the original bill for the purchase money of the lot. Bill prays for a specific performance and a conveyance of the lot. Huston is made a party, and his answer admits the partnership, confirms the settlement, and the understanding that the complainants' bond was to be paid in the carpenter's work aforesaid. Huston avers that his part of the eleven hundred and eighty-nine dollars was settled and paid by Moore and Porter. Huston disclaims all interest in the event of the suit.

Moore & Porter's answer admits the partnership and the execution of the carpenter's work: admits the exhibition to them of a bill of items amounting to eleven hundred dollars and upwards, but declares that they complained that the items were too high, and avers that they refused to settle; admits that they paid to Huston one half of the bill presented, and that they agreed to pay to McCullough about two hundred and fifty dollars, making the aggregate of eight hundred and fifty-eight dollars, being as much as the respondents supposed the work to be worth. The answer further denies all indebtedness beyond what has been paid, and charges that Huston was fully paid for his work, without including the note of \$340, which they still hold on McCullough for the consideration of the lot. They agree that if the work should be found to be worth the full sum charged, they are willing, if any balance is still due, that it shall be applied to the payment of this note, and aver their entire readiness to make a title whenever the purchase money is paid, &c.

After the hearing of the testimony, the court decreed a conveyance.

From the bill of exceptions, it appears that complainants moved to suppress the deposition of one Samuel Williams, on the ground that the deponent read from a written deposition which he held in his hands at the time of his examination before the magistrate, and the questions and answers were an exact copy of the former suppressed deposition. On

the hearing of the motion, the affidavit of complainant was read, from which it appeared that the witness, Williams, held in his hands what the affiant understood from witness, was a copy of a former deposition of same witness, which had been suppressed, and he read from the writing he held in his hands, both questions and answers, and as he read, the justice wrote the same down. The affiant objected to that mode of proceeding, but was overruled by the justice. The suppressed deposition had been taken in the absence of affiant or any agent of his, and Porter was present at this last examination. The motion was sustained by the court, and the deposition suppressed.

Thereupon the defendants applied for a continuance, for the want of the testimony of said Williams. Porter's affidavit was read on the hearing of this motion, which went to show due diligence on his part, the materiality of the testimony, and his expectation that by the next term the deposition could be had. The motion was overruled, and exceptions duly taken.

Testimony was then submitted for the purpose of proving a settlement with said Moore & Porter and complainant, and that it was understood that the amount of said note was paid for in said settlement. Testimony was also offered by defendants conducing to show that no such settlement took place, that Moore & Porter only settled for about eight hundred and fifty-eight dollars, and retained McCullough's note to abide the result of an admeasurement of the work, and a settlement of the prices in accordance with the contract.

Defendants also offered to read the deposition of witnesses, who had measured the work done by complainants and Huston, on said house of Moore & Porter, for the purpose of showing that the prices charged in the bill of items presented were too high, and that in the aggregate, they exceeded the customary prices, from two to five hundred dollars, and also testimony to prove that the work was not done in a workmanlike manner, all of which the chancellor refused to hear. To this refusal, defendants objected and saved their exceptions.

The first point insisted on as error, is the suppression of

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Williams' deposition. It is clear that a witness may resort to a written paper for the purpose of refreshing his memory, but it would be a dangerous practice to allow him to read *in toto* from a previously prepared affidavit. In a case cited at the bar, a deposition was allowed by the chancellor to be read, which was a mere copy of a suppressed deposition; but the court in that case allowed the deposition, because it had been suppressed for a mere informality. In this case the suppressed deposition was a mere copy of another deposition which had been suppressed, because it was taken *ex parte* without any notice. The court I think did not err on this point.

It is error
in the circuit
court to re-
fuse to grant
a continuance
when a good
cause is
shewn.

It is next objected that the court refused to grant a continuance, upon a suitable application. I have examined the affidavit of Porter for a continuance, and he seems to have made out a complete case. If there were any circumstances that induced the court to refuse the continuance, they were perhaps to be found in the fact, that two continuances had been previously made in the same cause, and one of them at the instance of the same party. But I cannot think that even this indulgence should deprive the party of his legal rights, when his affidavit shows the materiality of the testimony desired, and every degree of diligence that could be expected. The court should have given the party an opportunity of getting his testimony.

The third error assigned, is the exclusion by the court below of all testimony offered in relation to the exorbitance of the charges and the quality of the work. To ascertain the propriety of this decision, we must look into the state of the pleadings, and the issue submitted to the chancellor.

The bill averred a settlement, and that the amount of complainant's bond had been considered as paid in that settlement. The answer denies any such settlement, admits a settlement to the amount of eight hundred and sixty-five dollars, but avers that the note was still retained to insure against deficiencies and error in the settlement. The only question on this issue is whether there was in fact a settlement to the amount of eleven hundred and ninety-eight dollars, or whether the settlement only was for eight hundred

and sixty-five dollars. If the latter, McCullough, was not entitled to a conveyance of his lot, but if there was a settlement, as alleged in this bill, whether at exorbitant prices or not, and McCullough's bond was agreed and understood to be embraced in that settlement, the complainant was entitled to his decree. No averments were made in the defendant's answer to allow him to surcharge and falsify the bill of complainant and Huston. They are not without remedy, whether a settlement was made or not, but it would be rather inequitable that the whole deficiency, if there should be any proved, should come out of one partner, after paying up the other his half of the original charges.

In relation to the decree on its merits, I think it unnecessary to go into the details of the testimony, as it is clear to my mind that there is no such preponderance against the decree of the chancellor as would justify this court in interfering.

But because the court refused to allow the defendants an opportunity of procuring the testimony of the witness, Williams, I am willing that the judgment be reversed and the cause remanded.

Tompkins Judge—I concur in opinion with Judge Napton that the judgment ought to be reversed for the reason he gives. I also think there was no good cause why the deposition of Williams should have been suppressed. There was certainly evidence to prove that a settlement had been made made, and there was also evidence to prove that no settlement had been made to conclude Moore & Porter. The evidence of the value of the work ought then, in my opinion, to have been received. Moore & Porter were, in my opinion, under no obligation, to see that McCullough received as much from them as Huston; and therefore nothing can, in my opinion, be concluded against them on that account.

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GRANT Ex'r. of STONE v. BRINEGAR.

Grant, ex. of
Stone,
v.
Brinegar.

In actions of trespass if any damages be found for the plaintiff, he shall recover his costs, (see R. C. 1835, title costs, p. 129, s. 13,) (see R. C. 1835, title justices courts, p. 348, s. 4.)

Error to Boone Circuit Court.

Todd & Kirtley, counsel for plaintiff in error.

It is insisted that the plaintiff was entitled to a judgment for costs of suit upon the finding of the jury, and the judgment of court thereon. Stat. of Mo., costs 129 page, § 13. page 348, § 2 and 4.

Hayden counsel for defendant in error.

I contend that the costs were rightly adjudged in favor of defendant. Digest 348, sec. 2, 3, 4.

Opinion of the court by Napton Judge.

The plaintiff's testator sued the defendant in trespass in the circuit court of Boone county, under the statute allowing treble damages, and upon trial, a verdict for six dollars was returned. The court entered up judgment for eighteen dollars—but gave judgment for costs against plaintiff.

The 13th section of the act concerning costs provides, that in all actions of trespass, where any damage is found for the plaintiff, he shall recover his costs. This section is supposed to be modified or limited by the 4th section of the act concerning justices courts which provides that, "if any suit properly cognizable before a justice of the peace, be brought in any court of record, the plaintiff may recover judgment thereon, but the costs of such suit shall be adjudged against him."

The first section being special and solely applicable to actions of trespass, cannot be annulled by this last section, which is general in its terms and *might* include the cases enumerated in the first, but can be rendered effective without such construction. To give the construction which the court below has given, we must annul the 13th section of the act concerning costs.

The judgment for costs is therefore reversed.

In actions of trespass if any damages be found for the plaintiff, he shall recover his costs, (see R. C. 1835, title costs, p. 129, s. 13,) (see R. C. 1835, title justices courts, p. 348 s. 4.)

MALONE V. HARRIS.

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1840.Malone
vs
Harris.

Fraudulent representations respecting the subject matter of a contract will render the contract void; and if the party defrauded has advanced money or property, or rendered valuable service to the other party by reason of such representations, an action will lie for the recovery of such money or property or the value of such services, and it will not be necessary to prove a demand on the defendant for such property, and his refusal to comply therewith. The court held that "no man of correct morals would require a law authority in such a case."

Error to Saline Circuit court.

Miller, Stewart & Hayden counsel for plaintiff in error.

1. The court erred in giving to the jury the instructions asked for by plaintiff.

2. The court erred in refusing to give all the instructions prayed for by defendant. 1 Marshall 600. 1 Pirtle's digest 458. sec. 6, title fraud.

3. The court erred in refusing to set aside the verdict and grant a new trial.

Todd & McNutt counsel for defendant in error.

1. The jury might from the evidence believe that the interest of Malone was to procure possession of the plaintiff's money, property and labor, and to defraud him out of it, in which event, Harris was not bound to give any notice of rescinding such a fraudulent contract or obtain a return of the property.

2. The property and labor had a fixed cash value, and was received as such, even upon a failure of Malone's performance of his contract, he had no right to return in property, he being first in default in executing the contract.

3. That the contract to take the land as the consideration of the money, property and labor was never obligatory on Harris, he, Malone, refusing ever to shew him the land, that he might make his election.

4. The fact of Malone declining to carry into effect his contract to pay in land, is in law an assumpsit to pay what he has received for it in money. 2 Starkie, 106, 114, 116.

Opinion of the Court by Tompkins, Judge.

Harris sued Malone in the circuit court where he obtained a judgment, to reverse which, Malone prosecutes this writ of error.

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The evidence in the cause shows that some time in the month of May 1838, Harris, plaintiff in the circuit court, loaned to the defendant two hundred dollars on interest, at the rate of twenty five per cent per year, and sold a horse at eighty dollars, and labored for him three months at the rate of twenty dollars per month.

The defendant gave evidence to prove that sometime after this money was loaned at interest he and Harris entered into an agreement with each other concerning the sale by the defendant and purchase by the plaintiff of a tract of land in Carrol county, containing one hundred and twenty acres. This agreement was verbal. The land was represented as good woodland, situated on the river and suitable for a woodyard, and it was also proved that the money loaned to Malone as above mentioned was to be applied to paying for said land, and that the plaintiff agreed to give the horse above mentioned at the price of eighty dollars, in part payment for said land, and the remainder of the price of the land was to be paid to the defendant at the rate of twenty dollars per month; and it was also proved that the labor was performed to the amount of the land, at the price agreed on. The defendant also gave evidence to prove that no time was mentioned in the agreement, when he should make a conveyance of the land to the plaintiff Harris.—Thereupon the plaintiff Harris gave evidence that the verbal agreement about the sale of the land was conditional, and the plaintiff was to take the land on condition only that he should be pleased with it when he should see it; and that Malone, at the time of making said agreement, promised and agreed that he would go with Harris to the land, and show it to him; and that Malone neglected and refused to show the land to him upon reasonable request to do so; and that Malone had misrepresented the land to him, at the time of making said agreement; and that after having paid for the land, he demanded a conveyance by deed from Malone, and that it was refused. Malone, the defendant, then gave evidence that the agreement for the sale of the land was absolute, and not conditional, and that Harris agreed to take his word and representations as to the quality and description

of the land; and that Harris, after making the contract had expressed his satisfaction with the agreement he had made; and also, that after Harris had paid for the land and before the commencement of this suit, that he Malone had made, executed, tendered and offered to the plaintiff Harris, a deed of conveyance for the land in fee simple, which Harris refused to accept, and declared that he would not have a deed for the land. The plaintiff Harris then introduced evidence to prove that the deed was offered to him by Malone subsequent to the time when the said Malone had refused to make one on the request of Harris.

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This was all the evidence given in the cause.

The following instructions were given to the jury on the motion of Harris, plaintiff:

1. If they should believe from the evidence that the defendant Malone made representations to Harris that the land was timbered, and that Harris contracted for it as timbered, and that it was not timbered and of the kind represented, they will find Malone guilty of a fraud, and find a verdict for the plaintiff, Harris.

2d. If they find that the agreement was that Malone should show Harris the land before Harris was bound to accept it, and that Malone refused to show him the land, or avoided doing so, then there was a failure in Malone to comply with his contract, and that they must find a verdict for the plaintiff.

3d. That although the parties may have agreed that Harris was to accept land from Malone for the amount he owed Harris; yet if Malone made the contract with intent to deceive Harris, and did falsely represent and deceive Harris in the quality of the land, then they will find a verdict for Harris the plaintiff.

Malone, the defendant, then moved the court to instruct the jury:

1st. That in this action the plaintiff cannot recover the price of the horse, or any thing for him, unless they have proved a demand of the horse by the plaintiff, and a refusal by the defendant to return him on such demand.

2d. That if they believe the horse was a part of the con-

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sideration for the land, then the plaintiff cannot in this form of action, recover the price of the land.

These instructions, the circuit court refused to give, and Malone took his exceptions to the refusal of the court to give these instructions, and also to the act of the court in giving the instructions asked by Harris, the plaintiff.

Malone then moved for a new trial, and assigned for reason that the court had committed error, first in giving the instructions demanded by the plaintiff; and secondly in refusing those asked by the defendant.

This motion for a new trial was overruled.

It is assigned for error that the court gave the instructions asked by the plaintiff, and refused to give those demanded by the defendant, Malone.

Also that the court refused on the motion of the defendant to suppress certain depositions, of which nothing is mentioned in the bill of exceptions: and this court will not look into the clerk's unauthorized history of the case as transcribed on the record of the cause.

Fraudulent representations respecting the subject matter of a contract, will render the contract void: and if the party defrauded has advanced money or property, or rendered valuable service to the other party by reason of such representations, an action will lie for the recovery of such money or property, or the value of such services, and it will not be necessary to prove a demand on the defendant for

It appears to me that the court has committed no error, either in giving the instructions asked by the defendant in error, plaintiff in the circuit court, or in refusing those asked by Malone, plaintiff in error. If Malone deceived Harris in the representations which he made of the quality of the land or in representing it as timbered when it was not, it surely was such a fraud as no one could hesitate to declare, ought to avoid the contract.

No man of correct morals would require a law authority in such a case. If Malone agreed to show Harris the land before he was bound to accept it and he either refused to show the land or evaded doing so on request, the jury were very correctly instructed to find for Harris. Evidence was given to establish the fact that he neglected to show the land, and this neglect the jury were left to construe to be either a refusal or an evasion. But the most comprehensive and correct instruction given to the jury was the third, given on the motion of Harris. Fraud on the part of Malone ought to avoid the whole contract, if found as the judge of the circuit court instructed the jury. In such a case,

Harris ought not to be required to demand his horse, and perhaps he ought not to have been required to receive the horse even had he been tendered before the commencement of this action.

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Had it appeared to the jury that Malone had been guilty neither of negligence, nor of any unfairness of conduct in this transaction; and that Harris ought to avoid the contract merely because it was not obligatory on him, under the statute, then it might well have been contended that Harris ought to recover nothing for the horse until a demand by himself and a refusal to deliver by Malone. But as the evidence stands on the record, it appears to me that there is no error committed either by the circuit court or by the jury finding under the instructions of that court. For the reasons above given, the judgment of the circuit court ought to be affirmed, and judge Napton concurring it is accordingly affirmed.

such property and his refusal to comply therewith. The court held that "no man of correct morals would require a law authority in such a case."

WHEAT V. THE STATE.

1. Indictment for keeping a ferry without a license: held, that the State was not bound to prove that the defendant had no license; it devolved upon the defendant to show his license.
2. An indictment for keeping a ferry without license must specify upon what stream or river the ferry was kept.

Appeal from Livingston Circuit Court.

W. G. Slack, Counsel for Appellant.

The first ground upon which a new trial was asked and refused by the court was, "That the court erred in permitting the State to introduce new testimony, after the testimony on both sides had been closed." Decisions of Supreme Court, 1st semi-annual part, 1838. *Mary (a slave) v. The State*, page 71. *Hammel v. State*, 2 semi-annual part 1839, p. 260.

The indictment is bad, both for uncertainty and duplicity.

W. Adams, Counsel for the State.

That the court committed no error, on this point; at least if it was error, it was not such as to prejudice the defendant; for the State was not bound to make this proof; see 1st Philip's

6	455
38a	508
6	455
39a	115
6	455
40a	302
6	455
124	443
6	455
70a	566

AUGUST TERM. Ev. 198, latest edition. 2d Russell on crimes, 693, side p.
1840. S. P. United States v. Haywood, 2 Gallison 499.

Wheat
v.
The State.

Opinion of the Court by Napton, Judge.

The grand jury, for the county of Livingston, found an indictment against Martin Wheat, the appellant, for keeping a ferry without license. The indictment charged, that said Wheat on &c., at, &c. "did keep a ferry in the said county of Livingston, so as to demand and receive pay thereat, without a license," and that the said Wheat, on, &c., at, &c. "did then and there demand and receive pay, to wit, twenty-five cents for his services as a ferryman, without a license," &c. On the trial, and after both parties had declared they were through with their testimony, the court permitted the State to introduce a witness to prove that the defendant had no license. This was objected to by defendant.

The jury found the defendant guilty, and the judgment was given according thereto, and this judgment is sought to be reversed upon two grounds.

Indictment for keeping a ferry without license: held, that the State was not bound to prove that the defendant had no license; it devolved upon the defendant to show his license.

An indictment for keeping a ferry without license must specify upon what stream or river the ferry was kept.

First, Because the court allowed the State to introduce the additional testimony after both counsel had declared they were through. On this point I apprehend, no objection can be taken, that would be available here, inasmuch as the witness introduced, was for the purpose of proving a fact which the State was clearly not under any obligation to establish. It devolved upon the defendant to show his license.

Second, The indictment is objected to, and I think it is substantially defective. It does not specify on what stream or river, the ferry was kept; and as there may be several water courses in Livingston county, a conviction on this indictment would constitute no bar to another prosecution for the same offence. This want of certainty in the indictment is a fatal objection. The judgment is accordingly reversed.

THOMAS Appellant, v. THE STATE, Appellee.

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The State.

1. Where a demurrer to an indictment is over ruled, and the defendant refuses or neglects to plead further, the court should direct the plea of not guilty to be entered.
2. It is not necessary for the circuit attorney to subscribe his name to the indictment.

Appeal from Carroll circuit court.

Davis counsel for Appellant.

1st. The indictment is not signed by the prosecuting attorney or any one for him.

2nd. The indictment does not sufficiently describe the offence.

3rd. The court entered judgment for the fine without finding the defendant guilty of the charge.

1st point. See Rev. Statutes Mo., page 89, sec. 4, title "attornies at law," also title "practice at law," page 458, sec.

6. 1st Chitty crim. law 335, side page.

2nd point. See statute 209, sec. 30, crimes and punishments.

3rd point. See statute p. 485, sec. 4, title "practice and proceedings in criminal cases."

Opinion of the court by Tompkins Judge.

The plaintiff in error was indicted for horse racing. The defendant demurred to the indictment; the circuit court over ruled the demurrer, and then assessed the defendants' fine to ten dollars.

The indictment charges the offence in the words of the statute, and comment is useless.

But the statute directs that, in all cases where the defendant does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had as if the defendant had formally pleaded not guilty to such indictment.

The law never contemplated that a man charged criminal-ly, means to confess the indictment to be true when he demurs: even in civil cases the defendant who has a demurrer decided against him, is allowed to withdraw his demurrer and plead. A jury then should have been empannelled to find whether the defendant was or was not guilty.

Where a demurrer to an indictment is over ruled, & the defendant refuses or neglects to plead further, the court should direct the plea of not guilty to be entered.

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It is not necessary for the circuit attorney to subscribe his name to the indictment.

It was also charged as a defect in the indictment, that it was not subscribed by the circuit attorney; and reference is made to the 6th section of the 3rd article of the act to regulate practice at law, page 458 of the digest of 1835.— This section directs that declarations and other pleadings shall be signed by the party or his attorney.

This act purports to regulate the practice in civil cases only; and there is another act to regulate the practice in criminal cases.

I am not aware of any provision in that act requiring the circuit attorney to subscribe his name to indictments.

The judgment of the circuit court is reversed, and the cause will be remanded to be proceeded in conformably to this opinion.

TALBOT V. GREENE.

The Circuit Courts have concurrent jurisdiction with Justices of the peace when the subject matter in controversy does not exceed in value fifty dollars, (R. C. 1835, title "courts" p. 155, sec. 8, do title "costs" p. 129, sec. 13 and 14 do, title "justices courts" p. 348, sec. 2, 3, and 4.)

Error to Howard Circuit Court.

Leonard, counsel for plaintiff in error.

That the plaintiff is entitled as a matter of right to a judgment in this cause for costs.

First. By the 5th section of the act "costs" Rev. Stat. 128, all plaintiffs recovering judgment are entitled to costs as incident to such recovery.

Second. This general right is limited by sections 13 and 14, of the same act in the two following classes only.

1. By section 14, if the suit be properly cognizable before a justice of the peace, costs shall be adjudged against the plaintiff.

2. By the section 13, if it be an action of trespass and any damages be found, or if it be any other action, the subject matter of which is cognizable before the court, but the amount of damages (recovered) be below the jurisdiction of the court, the costs shall be adjudged to plaintiff or defendant, according to the discretion of the court. *Hayden v. Sloan* 3. Mo. Rep. 328-329.

Todd, Kirtley and Davis, counsel for Defendant in error. AUGUST TERM
1840.

See Rev. Stat. title costs page 129, sec. 13, and 14, same title justices courts page 348, sec. 4.

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See also the case of Jones and Jones v. Relfe 5th vol. decisions of this court page 542, made in the 4, judicial district May term 1839.

Opinion of the Court by Napton Judge.

Talbot sued Green in an action of assumpsit for medical services, and laid his damages at three hundred dollars. He had a verdict for eighty four dollars and twenty-five cents. On motion of defendant, the costs were taxed against the plaintiff, to which, plaintiff excepted and seeks to reverse this judgment, in this court.

The act concerning justices courts (art. 1. S. 2.) declares that justices shall have jurisdiction in all actions founded on contract, where the debt due, or damages claimed shall not exceed ninety dollars. The third section, provides, that in actions on bonds and notes for the payment of a sum exceeding ninety dollars and not exceeding a hundred and fifty, the circuit court shall have concurrent jurisdiction with the justices. The last section seems to imply that in the cases enumerated in the first, the court has exclusive jurisdiction. But the act, in relation to courts, declares (p. 155 Rev. Co.) that the circuit court shall have concurrent original jurisdiction with justices of the peace, in actions of tort and in all cases, which by law, are not exclusively cognizable before justices of the peace, where the matter in controversy shall be of the value of fifty dollars, or the title to lands is drawn in question &c.

It is not very easy to reconcile this section with the preceding sections quoted from the act in relation to justices courts; but it is difficult to resist the conclusion drawn from the express words of the act concerning courts, that the circuit court has concurrent jurisdiction where the subject matter in controversy does not exceed in value fifty dollars. Why the concurrent jurisdiction should afterwards have been limited to sums between ninety and one hundred and fifty

The circuit courts have concurrent jurisdiction with justices of the peace when the subject matter in controversy does not exceed in value fifty dollars,

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(R. C. 1835,
title 'courts,'
p. 155, sec. 8;
do. title
'costs,' p. 129,
sec. 13 & 14;
do. title 'jus-
tices courts,'
p. 348, secs.
2, 3, & 4.)

dollars, does not appear upon this construction of the act. If this construction be correct, the circuit court had jurisdiction over the amount *recovered* as well as claimed in this suit.

The fourth section of the act concerning justices courts (p. 348,) provides, that if any suit properly cognizable before justices of the peace, be brought in a court of record, the plaintiff may recover judgment thereon, but the costs of such suit shall be adjudged against him. The 13th, section of the act concerning costs provides, that in all actions of trespass, if any damage is found for the plaintiff he shall recover his costs, and in all other actions, which shall be prosecuted in any court, the subject matter of which is cognizable before such court, but the amount of damages recovered, shall be below the jurisdiction of the court, the plaintiff or defendant shall recover costs, in the discretion of the court. The next section (S. 14) declares that if a suit is commenced in the circuit court, which is properly cognizable before a justice of the peace, the plaintiff may recover judgment, but the cost shall be adjudged against him.

I do not pretend to be able to reconcile these conflicting provisions but in this case, the damages were not reduced below the jurisdiction of the circuit court, and costs should therefore have been adjudged, as in ordinary cases.

Judgment for costs is therefore reversed and the clerk is directed to enter up judgment for costs against defendant below.

BENNETT V. MARTIN.

A plea admitting the existence of a patent but denying its validity is bad, as the plea refers a matter of law to the jury.

Error to the circuit court of Cole county.

Todd & Kirtly counsel for Appellant.

1. That the pleas are affirmative to avoid the patent and consideration of the note *ab initio*.
2. That he must prove every fact necessary, and produce the patent.

Hayden and Leonard, counsel for Appellee.

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1. That the burthen of proving the existence of a patent for the Truss mentioned in the pleadings, devolved upon the plaintiff, and having failed to give or offer any, the non suit was proper. See 3 Phil. on evidence, 490, apothecary's company v. Bently. Ky and Mood N. P. 159. 1 John. 513. 1 Starkie 322, 3, 4. C. T. R. 40, top paging.

Bennett
v.
Martin.

Opinion of the court by Tompkins Judge.

Bennett brought his suit against Martin in the circuit court; and the judgment there being in favor of the defendant, Bennett prosecutes this writ to reverse that judgment.

The plaintiff declared on a bond, made to him by Martin for the payment of five hundred dollars. The defendant pleaded in bar that the bond was given in consideration of the right and privilege of a certain supposed patent right existing under the United States, called and known as Stagner's Patent Truss for curing the Hernia; and that the defendant did, to secure the payment of the said sum of money, make, execute and deliver the said writing obligatory and for no other consideration, and avers that at the time when the plaintiff sold to the defendant the said privilege and right of using the said supposed patent right as aforesaid, the said supposed patent was, and ever since have been and still is, void in law, and of no effect or validity whatever. To this plea the plaintiff replied, denying that his patent was void. An issue was made and the plaintiff gave the bond in evidence. The court, on motion of the counsel for the defendant, instructed the jury, that the plaintiff had not made out his case, and that they must find for the defendant.— Upon this, the plaintiff took a non suit, with leave to move to set it aside. This motion was over ruled by the circuit court.

This plea admits the existence of a patent, but denies its validity. If the counsel for the defendant had desired to test the validity of the patent, then they should have pleaded, that there was no such patent, and on the production of the instrument in court by the plaintiff, the defendants counsel might have given in evidence, any fact which would ren-

A plea admitting the existence of a patent, but denying its validity is bad, as the plea refers a matter of law to the jury.

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der that instrument void in law. Framed as the plea is, the law is left to be found by the jury. The plaintiff ought to have demurred to this plea.

The judgment of the circuit court is reversed and the cause is remanded for further proceedings, and the defendant, if he wishes, will be allowed to withdraw his plea and plead again.

THOMAS V. REYNOLDS and others.

It is the opinion of Tompkins Judge, that a debtor cannot make a valid deed of assignment, to a person selected by himself, for the benefit of his creditors. Napton Judge dissenting. McGirk Judge absent.

Appeal from Howard Circuit Court.

Leonard & Todd, Counsel for Appellant.

1. That one partner who is the active partner, may assign all the goods to pay debts.

2. The more especially, as the other partner is non-resident.

3. That the letter of instruction to make the deed is sufficient authority for the execution of the deed; and makes it the deed of both partners.

4. The deed of ratification subsequently made, relates back to the execution of the deed, and makes it the deed of both ab initio.

5. The deed of Whiting, for the firm, by the letter of instruction of his copartner, with the advice of a majority of creditors, and possession had by the trustee, gives such a title to the plaintiff, for the benefit of creditors, that cannot be divested by any subsequent levy of execution by other creditors.

6. Without the subsequent assent of creditors, the law will presume assent, from the fact that the deed is beneficial to the creditors. 1st Black 457. 11 Whea. 78. Hood v. Sibley 3. Mo. Rep. 290; 5 do. 484.

Davis, Counsel for Appellee.

1. That one partner cannot execute a deed for the firm.

2. That the deed of assignment in this case is void. Hughes v. Ellison, 5 vol. Mo. Rep. page 463. AUGUST TERM 1840.

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Opinion of the Court by Tompkins, Judge.

Thomas, the appellant, sued the appellees in the circuit court, and the judgment of that court being rendered against him, he appeals to this court.

The plaintiff in this action sought to recover against the defendants for seizing, and selling and converting to their own use, certain personal property as belonging to E. Whiting & co., which had been assigned to the plaintiff, as he contended, under trusts declared in the deed of assignment.

The deed purported to convey the property to Thomas the plaintiff, in trust to sell it and pay debts of the company. Of those debts some were preferred, viz: debts due to Reuben Watts and John Wilson of Fayette, and to one Charles Brown of Boston. After paying those debts it was provided, that all just debts at that time due and owing by the firm, were to be paid, and the trustee was to hold the residue for the benefit of the company. All the property, both real and personal belonging to this firm was conveyed by this deed for the purposes above mentioned. The firm consisted of said Whiting and one Williams, residing in Boston, Whiting had been the acting partner in Missouri. The deed had been made by the direction of Williams, and he afterwards assented to and ratified it in writing. The goods in question were, in pursuance of this deed, delivered over to Thomas as the plaintiff in the circuit court and appellant here. The appellees were, except Reynolds, judgment creditors of Whiting & Co., and their judgments were obtained before the transfer by Whiting to Thomas, and the seizure was made under the authority of executions issued on those judgments, Reynolds was the officer who levied on the goods.

Upon this evidence the court, on motion of the defendants instructed the jury that the plaintiff could not recover. The plaintiff then took a non-suit with leave to move to set the same aside. The circuit court overruled his motion for that purpose; and he excepted to the decision of the court. The appellees contend that the deed being made by Whiting a-

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lone is void, and that the defect is not cured by the subsequent assent of the other partner, Williams.

There have been several decisions on the subject of this kind of assignments. In the cases hitherto decided the court has restricted itself to the decision of such points only as it became necessary to decide, organised as this court is, it frequently becomes very difficult, indeed impossible to have all its decisions on one subject under its view, so as to be enabled to review them. The decisions of most importance were made at St. Louis in May last, and they are not to be obtained here. I shall proceed then to give my opinion on this case without reference to any thing before decided, nor indeed do I esteem it of any great importance that the former opinions are not reviewed; for the judgment of the circuit court will be affirmed by a division of this court, it consisting at this time of two judges only. It is not, in my opinion, at all necessary that Whiting should convey the property to Thomas by deed, that is, the property which the appellees are charged with seizing &c.

He had transferred it by the direction of his partner Williams, and against any claim on his part the transfer to Thomas was, in my opinion, valid. But as against such creditors as did not choose to acquiesce, the transfer was in my opinion void, however correct the instructions of Whiting and Co., may have been.

It was, in my opinion, void as against creditors because it is against the policy of the law. Whiting and company, had they been willing to do equal justice to all their creditors, might have applied under the provisions of the act for the relief of insolvent debtors, and the circuit court, or a judge thereof in vacation, would by that law have had authority to appoint a trustee for the benefit of the creditors. But he lives a number of years probably in our country, has the aid and protection of the institutions of the State, has probably collected many debts from the citizens by the aid of the courts of justice, and when he becomes unable or unwilling to pay his own debts, the laws of the country are found to impose restrictions too onerous for him to bear.

Instead of leaving the choice of a trustee to the impartial

tribunal provided by law, he, the person interested to cheat his creditors, selects a trustee to suit his own purposes. He may be honest in his selection, and his creditors may have no confidence in his integrity. Even if they believe him honest they may believe him unwise in his choice. His trustee may be neither delinquent nor honest, yet he is to decide on the validity of the claims of the several creditors, and is neither chosen by the creditors, nor accountable to them. We may be told that a debtor may pay one creditor in preference to another. Be it so. But when the debtor transfers his property to a trustee to raise money to pay a preferred creditor, this is not passing the property over to the creditor in satisfaction of his demand. The effect of the act, if it be valid, is to withdraw so much property from the liability of being seized under legal process to satisfy debts, already ascertained by the judgments of our courts, for the purpose of subjecting it to the payment of such demands as this trustee, chosen by the debtor may decide to be due from the debtor to the creditor. The worst of the matter is that the debtor himself declares who are his own creditors and in what order they shall have their judgments entered up, and satisfied in this court of his own creation. The common law and her younger sister the Statute law smile on the diligent, not on the sluggard. Whiting and Company have some friends among their creditors whose diligence is not so great as that of some others. They erect a court of their own, and appoint their steward to this high court; they declare by their own law, that to this court all their creditors shall resort; and in contravention of the general law of the land, that three favored creditors shall be first served, although the other creditors may appear first in order of time. Under their superintendence both as Judge and jury, the steward ascertains the amount of each creditors demand. Indeed the firm of Whiting & Co., is witness as well as Judge and jury.

It appears in the bill of exceptions that the assignee visited St. Louis soon after he had been appointed and possessed of the property, where he entered into an agreement

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with about thirty of the creditors to discharge his duty faithfully &c. and they on their parts agreed with him to allow the other creditors to come within four months and participate in the assigned property, they executing receipts in full, and in fact releases, if we may suppose that such people know what is a release. That however is the plain import of the language used. On account of a provision of this kind inserted in a deed of assignment which was the subject matter of adjudication, at the last term of this court held at St. Louis, the deed was declared void, if I am not greatly mistaken. In my opinion it is altogether immaterial whether such a provision be incorporated in the deed or whether the trustee make that provision his rule of conduct. For even without that provision, I thought then, as I do now, that the deed ought to be declared null and void.

When the learned counsel in the course of his argument declared that the conduct of his client was so warmly approved by the creditors residing at St. Louis, I had supposed that he was volunteering evidence by way of argument to prepossess the court in favor of his clients, I did not suppose his client would have been so ill advised as to spread such matter on the record. But to do the counsel justice he was too judicious to read it to the court. and I suppose hoped it would escape observation amidst the mass of irrelevant matter that swelled the record to unusual size. It is my opinion long entertained and deliberately made up, that if the courts of law tolerate the practice of suffering the property of debtors to be withdrawn by means of deeds of this kind from the reach of legal process, they will be alike faithless to the law and the constitution. It is in vain that an equality of rights forms the basis of all our laws, if persons who choose to declare themselves to be in failing circumstances, are allowed to be exempt from any liability to have their property sold by judgment creditors under legal process merely because those debtors declare that they wish to lock up such property for the benefit of their particular friends. The judgment of the circuit court ought, in my opinion, to be affirmed.

Napton Judge, dissenting. I do not concur in this opin-

ion, for the reasons given in my opinion in the cases of Brown v. Knox and Boggs; and Drake v. Rogers and Shrewsberry delivered at St. Louis last spring term. The same point, in relation to the validity of a deed executed by the active partner only, has been so ruled by Ch. J. Marshall in Anderson and Wilkins v. Tompkins, 1, Brockenborough R. 456.

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DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

THIRD JUDICIAL DISTRICT.

SEPTEMBER TERM 1840.

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KIRK, alias KIRKPATRICK, v. THE STATE.

The caption forms no part of the indictment.

**Appeal from the Criminal Court of St. Louis, May
Term, 1840.**

Crawford for Appellant.

That the indictment should contain *in itself* every thing necessary to enable the party indicted to make a full defence, without intendment, implication, or reference. It is the right of such party to plead to the jurisdiction of the court. The indictment in this case, does not inform the party as to the court in which it is found, and is therefore defective, and the defect fatal.

That it is the right of a party indicted, to avail himself of any legal objections to the grand jury. The indictment in this case, does not inform him as to the term of the court, nor the time of finding the indictment, so as to enable him to avail himself of such legal objections as may exist against the grand jury, or the persons composing it, and is therefore defective, and the defect fatal. The endorsement of the clerk as to the time of filing the indictment, forms no part of the indictment.

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That the indictment should have adopted the terms of the Statute. It will be seen by reference to the record, that the terms adopted in the indictment are at variance with the terms of the statute, and therefore defective, and the defect fatal. Authorities; State of Missouri vs. Comfort, decided in 1838, page 358. State of Missouri vs. Hunter, decided in 1838, page 361. 1st Chitty's criminal law page 282.

The appellant has been prosecuted under the statute against stealing "*slaves*." The indictment charges him with having stolen a "*negro boy*." This I contend is not in conformity to the terms of the Statute, and the description that he is "*a slave for life*," does not cure the defect. There is no statute against stealing a "*negro boy*." The "*negro boy*" may have been free, and if so, no description, such as being "*a slave for life*," can make him one. Same authorities as above; also Archbold, where under the statute against stealing cows, it was charged in the indictment for stealing a heifer, was held to be defective.

Benton Circuit Attorney, for the State.

1st, That there is no necessity for caption to an indictment, or reference in the indictment to the court, or the term thereof; these facts are sufficiently shown by the entries on the record. This answers also the second reason.

2d. The third reason is in substance, that the indictment does not charge the said Kirk with having stolen a slave. This will be answered by inspection of the indictment.

3d. The 4th reason is that the indictment does not charge the said Kirkpatrick with having stolen a slave contrary to the form of the statute in such case made and provided. The truth of this is also matter of inspection, and depends solely on the indictment.

Opinion of the Court by Napton, Judge.

An indictment was found at the January term, 1840, of the St. Louis criminal court, against the appellant, for stealing a slave. The defendant was convicted, and his counsel moved in arrest of judgment, which motion was overruled. The case is brought here by appeal.

The indictment was as follows: State of Missouri, county of St. Louis, sc. The grand jurors, &c. present, that Joseph Kirk, alias Kirkpatrick, on &c., at &c., one negro boy, slave for life, named John, aged about twenty years, did steal, take, and carry away, contrary to the form of the Statute in that case made and provided, and against the peace and dignity of the State. John Bent Cir. attorney.

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The only objection urged to this indictment, is the omission to state in the caption, in what court, or at what term of the court, the bill was found.

The records of the court show in what court and at what term, this bill was found, and the caption of the indictment forms no part of the indictment. It does not give any information to the accused, as to the nature of the charge, and is in fact a mere memorandum by the clerk or attorney, and becomes only useful when the record is taken to another court.

The caption
forms no part
of the indictment.

Some objection has been made also, that the indictment does not adopt the terms of the Statute. The indictment used the word "slave" as the statute does, but describes the said slave as a negro boy, aged &c. named &c. The indictment is good, in this respect, as well as every other. Judgment affirmed.

MANNING plaintiff in error v. CORDELL defendant in error.

Counsel, assigned by the court to slaves for their defence in criminal prosecutions, have no claim upon the masters of such slaves for compensation for professional services, unless there be an understanding to that effect between such counsel and masters.

McGirk Judge dissenting.

Error from the St. Louis Circuit Court.

Manning in propria persona.

1st. That so far from any assent or understanding between the plaintiff and defendant being necessary to have been shown, neither the assent should have been exhibited, nor the understanding had, if the law be obeyed. 3. Story's comm. on const. 665-27 sect. of the 3rd art. of const.

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of Mo. 9th sect. bill of rights Mo. 6 art. amdt. of constitution 105.

2. That the defendants refusal to employ counsel to defend his slave, is to be considered as an act of obedience to the constitution of this State, as every man is presumed to know the laws of the Government under which he lives and to be anxious to obey them 27 sect. art. 3. const. Mo.

3. That the assignment of counsel by the court in the prosecution of a slave for crime, and on his behalf, was not, and never should be the consequence of a refusal on the part of the master to defend his slave, but is the duty of the court acting in obedience to the constitution of this State. Sect. 27, art. 3, const. Mo.

4th. That this exercise of obedience on the part of the court neither could nor should have any influence upon the assent or promise of the owner of the slave, or understanding between the counsel assigned and the owner of the slave, as he (the owner) is deprived of any interference in the case by the constitution, so jealous is it of the impartiality of the trial; but an implied promise is raised on part of the owner, by the act of selection by the court, sect. 27 art. 3d, const. Mo.

5th. That the provision of the constitution protecting the slave in prosecutions for crime, was intended to act in no other wise, than to carry out completely, its principles of justice, humanity, and impartiality, and in no manner changes the relative legal responsibilities of client and counsel. Sect. 27, art. 3d. const. Mo.

6th. That our government is one based upon an equality of rights, taxes, and impositions; and that the constitution never could have intended that one citizen should work or labor for another, without just compensation from him. 7th. Sect. bill of rights Mo.

7th, That the constitution never intended that the government might rightfully claim the services of one citizen, for the benefit only of another, but bases its claim for services, only when the benefit inures to the whole or a larger part of its people, or at least to the public. Bill of rights mo 7, sect.

8th. That any other construction of the constitution, would work injustice and therefore be repugnant to the genius of our institutions. It would work injustice, because it would compel one citizen (without a forfeiture of any of his rights by conviction of crime) to labor for another, however rich and powerful, without reward from him, and without the right on the part of Government to compensate him.

9th. That if it be true that the constitution compels one citizen to defend the slave, the property of another, without compensation, the legislature may enact a law, compelling him to labor *in curia* in defence of other property; thus leaving to the legislative branch of the government, the exercise of a power subversive of all the inestimable rights of a free people, because, though the life of the slave belongs to God and is protected by the Government, yet the services of the slave and the value of his life are property and belong to the owner of the slave; and any injury done to the slave which may lessen either his services or the duration of his life, is damage done to the owner thereof; now the conviction of a slave for crime, may lessen his property, surely then, if one citizen be bound to protect this property, of the owner in a slave without reward, he may with equal justice be called upon to labor in defence of other property of the owner, without any reward or just compensation, a principle of injustice unsanctioned by the constitutions of a free people.

Geyer, for defendant.

The defendant now insists, as he did in the circuit court, that he is not liable to pay the plaintiff any thing.

Constitution, art. 3, sec. 27, rev. C. 1835 p. 485.

Opinion of the Court by Napton Judge.

A slave, the property of Cordell, was indicted in the circuit court of St. Louis, for a felony, and the court assigned the plaintiff in error as counsel for the slave.

The plaintiff in error brought suit against the master, for professional services in defending his slave. On the trial, the court instructed the jury, that if they believed that the plaintiff acted as counsel for the slave, upon an understanding

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Counsel, assigned by the court to slaves for their defence in criminal prosecutions, have no claim upon the masters of such slaves for compensation for professional services, unless there be an understanding to that effect between such counsel and masters.

McGirk
Judge dissenting.

with the defendant, that he should be paid for his services they should find for plaintiff; but if they should be of opinion, that the plaintiff acted as counsel assigned by the court to defend the slave in question, they shall find for the defendant, notwithstanding they may be of opinion that in obeying the order of the court, or yielding to the wish of the court, the plaintiff was influenced by the expectation that the defendant as owner of the slave would pay him.

The professional services were proved, but it was also proved that Cordell, the owner, declined employing counsel, whereupon the court appointed Mr. Manning, who was an attorney and counsellor at law. Verdict and judgment for defendant.

I am of opinion that the court did not err in its instruction. If the constitutional provision be imperative on the counsel, as well as the court, and was intended to deprive the master of his right of selection, it would only raise an implied assumption against the State. The counsel acts in such case as an officer of the court, and for the furtherance of justice, and not upon any contract with the master, nor can any be implied. Judgment affirmed.

McGirk, Judge. I do not concur in the foregoing opinion.

CERRE V. HOOK.

The confirmations of the Recorder of land titles, under the act of Congress of 13th June, 1812, are evidence of title, in an action of ejectment, under our statute relating to evidence, (R. C. 1835, title "evidence." See adm'r of Janis v. Gurno, 4 Mo. R. p. 458. S. C. 6 Mo. R. 330.)

Error to the St. Louis Circuit Court.

Bogy and Hunton for Appellant.

1. The first error assigned is the court giving judgment for the defendant. Vol. 1 Land laws U. States, page 620. Janis vs. Gurno, 4 vol. Mo. Rep. 458.

2. A transcript of testimony taken before Theodore Hunt as recorder of land titles, was then offered to be read in evidence, which was refused by the court. This we believe also to be error. Act of 26th June, 1821.

3. The third error assigned, is the instructions of the court below to the jury to find for the defendant.

4. It follows as a matter of course, that if any of the three preceding propositions be correct, that the court should have granted a new trial.

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B. Allen for Appellee.

It is contended in this case that the act of Congress 13th June, 1812, operates on those claims only of which notice had been previously given to the Recorder, or the evidence of which was in his office, originating by concession or order of survey.

That inasmuch as no evidence in the cause shows this to have been such a claim, there is no error. Acts of Congress 13 June, 1812, sec. 1. 2 Mar. 1805, sec. 1, 2, 3, 4, 5. 21 Apl. 1806, 1, 2. 3 Mar. 1807, 4, 7.

Opinion of the Court by Napton, Judge.

This was an action of ejectment brought by Gabriel P. Cerre, to recover a lot in the city of St. Louis. On the trial of the cause, the plaintiff offered in evidence a confirmation of the lot in question by the recorder of land titles, under the act of 1812, to the legal representatives of Michael Lamie. It appeared from the testimony, that Madame Lamie, the wife of Michael Lamie, had been previously married to one Douchouquette, by whom she had six children. The only child by her last husband married Paschal L. Cerre, and died leaving three children, of whom the plaintiff is one.

Some testimony was offered to prove the possession and cultivation of the lot in controversy, by Michael Lamie, previous to 1803. The plaintiff also offered deeds from two of the Douchouquettes, children of Madame Lamie by her first husband, who after the intermarriage of their mother with Michel Lamie, were generally known by the name of Lamie.

It was also proved that the lot described in the declaration was the same as that described in the certificate of confirmation by the recorder, and it was admitted that the defendant was in possession.

The confirmations of the recorder of land titles, under the act

The defendant offered no testimony, but the court instruct-

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Mo. R. 330.)

ed the jury, that the plaintiff had not made out a prima facie case. It has been decided by this court in the case of Janis v. Gurno, (4 Mo. R. 458,) that the confirmations of the recorder under the act of 13th June, 1812, are evidence in an action of ejectment under our statute. This opinion was

re-iterated in the same case, decided at the last term of this court. The court are not disposed to review the positions assumed in those cases.

The judgment in this case will therefore be reversed, and the cause remanded.

(see adm'r of Janis v. Gurno, 4 Mo. R. p. 458. S. C. 6 Mo. R. 330.)

CITY OF ST. LOUIS v. MORTON.

The provisions of the act of March 18th, 1835, authorising the sale of the St. Louis commons, are directory, and not conditions precedent to the exercise of the power therein vested in the Mayor and board of Aldermen of the city of St. Louis: Therefore in an action of covenant brought by the Mayor, Aldermen and citizens of the city of St. Louis, on an indenture of lease of a part of the commons, the defendant is estopped from denying that the preparatory steps required by said act were complied with.

Primm for Plaintiff in error.

That the defendant is estopped by his own hand and seal from setting up as a defence, the matters contained in the 3rd, 4th, 5th, and 6th pleas. Demurrer was properly used in this case. 1 Chitty pl. 634.

That the estoppel here arises by the deed sued on. Co. Litt. 352 a.

That defendant is estopped from denying that the requirements of the statute in relation to the sale of the common have been fulfilled. Defendant, by signing and sealing the indenture sued on, *admitted* that all these things had been done.

Defendant nowhere alleges that the omission to do these things on the part of the mayor, &c. has resulted in injury to him, but he draws the conclusion by reason of this omission is *void in law*.

Defendant's pleas undertake to set up a title to the demised

premises in the inhabitants of the town of St. Louis as limited on 13th June, 1812. A tenant is not permitted to controvert the title of the person under whom he came into possession. 2 Blk. 1259. 1 T. R. 760 n. 3 T. R. 14. 6 T. R. 62.

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When a person assents to an act, and derives title under it, he cannot afterwards impeach it. *Rex. v. Stacey* 1 T. R. 1. *Woodfall's Land & Ten.* p. 143. *Drury & Wyman v. Fay*, 14 Pick. Rep. 328. *Cutler v. Dickinson*, 8 Pick. 386.

The defendant should, before signing the deed, have satisfied himself that all the provisions of the law had been complied with. He being the party most interested in finding this out, should not have entered into the covenant without knowing what he was about.

The estoppel is complete, being *mutual*. The plaintiff cannot avoid the deed, nor shall the defendant be allowed to do so.

Geyer, for Defendant.

That the judgment of the circuit court ought to be affirmed, because,

1. There is no estoppel to prevent the defendant from pleading the matters, or any of them set up in bar, as is contended for by the plaintiff. The defendant may not deny a fact admitted by his deed, but he may plead matter in avoidance, as infancy, coverture, fraud, gaming, usury, &c. In this case the deed does not admit the title, or the authority of the grantors, and the defendant is at liberty to deny either. The assignee of a patent may plead that the invention was not new, and that the patentee was not the inventor. *Hayne v. Maltby*, 3 T. R. 438. In general a grantor is estopped by his deed to say he had no interest, but this does not apply where the grantor as in this case, is a trustee for the public, deriving his authority from a public statute. 2 T. R. 169-171. See also 4 Bac. Ab. 140. Laws by authority *passim*.

2. If the pleas in this case are true, and the demurrer admits them, the deed is absolutely void, and cannot operate even as an estoppel against the plaintiff, and if there be an estoppel at all, it is mutual. Both parties are estopped or

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neither. Cro. Eliz. 36. The plaintiff may deny the authority, and why not the defendant? 2 T. R. 169, 171. 4 Bac. Ab. 140. Platt on costs 19, 3. No sale of the common was authorized by the proprietors, or by any person or power authorized to confer such authority. The act of the 13th June, 1812, operated as a grant *proprio rigore* of the commons to the inhabitants of the town of St. Louis, and from that moment they were the proprietors in full property, and neither the Congress of the United States, nor the State Legislature, could control the disposition of it.

4. The title was vested in the inhabitants of the town of St. Louis, and not in the municipal corporation called the mayor, aldermen and citizens of the city of St. Louis.

5. The corporation not being the proprietor, and deriving no authority from the proprietors directly or indirectly, the sale and the deeds made in consequence are utterly void.

6. Upon the supposition that the Legislature derived a power to provide for the disposition of the commons by the general grant of Legislative power, or by the act of congress of 1831, it would not lawfully decide the judicial question, who are proprietors within the terms of the grant: nor had it the power to apply proceeds to any other use than that of the proprietors; but both being attempted by the act of 18th March, 1835. That act is void, and consequently all proceedings under it.

7. If the Legislature could confer authority to any one to make the sale, &c., that authority must be pursued by the agent, or his act is void. 2 T. R. 169, 171. 4 Bac. Ab. 140.

8. The first section of the act 18th March, 1835, undertakes to determine who are the proprietors, being the owners of lots within the town as limited on the 13th June, 1812, whose votes are to be taken for and against a sale; and by the 2d section, if a majority of such owners consent in the manner prescribed to the sale of the common, then the mayor and aldermen, (*not the corporation*), are authorized to make sale, &c., in the manner and upon the conditions in the act specified. It is alleged in the pleas, and admitted on the record, that the majority of such owners did not consent. Consequently there was no authority for the sale.

9. There are also several conditions prescribed as the manner of exercising the authority, and among them that a survey into lots, streets, &c. is to be made, a plat made, and recorded, the time, place, and terms of sale advertised, and deeds to be made by the mayor and aldermen, and if the pleas be true, all of them have been disregarded.

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10. Whether the pleas be bad because of an estoppel, or of the matter pleaded, or not, still the demurrers were properly over-ruled, because the declaration is bad.

Opinion of the Court by Napton, Judge.

This was an action of covenant brought by the Mayor, Aldermen and citizens of the city of St. Louis on an indenture of lease. The declaration was as follows: The city of St. Louis, successors of the Mayor, Aldermen and citizens of the city of St. Louis, complain of George Morton of a breach of covenant, for that whereas heretofore, to wit, on &c., at &c., by a certain indenture made between the parties aforesaid, (profert of which is made,) the said Mayor, &c., did demise, grant, and to farm let to the defendant, his executors and administrators and assigns, a certain lot with its appurtenances situate in the St. Louis common, to have and to hold the said lot and messuage upon certain conditions, among which was that the defendant should yield and pay for the premises demised, as a yearly rent, unto the Mayor, &c., and successors, the interest of five per cent a year on the amount bid for said lot, being the sum of \$525 93, at the expiration of one year from the date of said indenture, and the like sum at the expiration of every year thereafter; and secondly, that at the end of fifty years from the day of sale being the 12th March 1886, and every fifty years thereafter and after assessment made by the public assessor agreeably to the act of the General Assembly of the State of Missouri passed 18th March, 1835, entitled "an act to authorize the sale of the St. Louis common" the said defendant should pay five per cent a year upon such assessed value as a yearly rent; and thirdly, that should the interest aforesaid remain unpaid for six months after due, the Mayor &c., might annul the sale, and proceed to sell again according to the

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act of Assembly aforesaid; and fourthly, that after the expiration of ten years from the day of sale, the said defendant might pay the sum of ten thousand five hundred and eighteen dollars and sixty cents, being the amount bid for the lot, and receive a deed in fee simple with special warranty only against the inhabitants of St. Louis and all persons claiming under them; and the said defendant did covenant for himself, executors, &c., should well and truly pay or cause to be paid to the said Mayor, &c., the yearly rent of \$525 93, at the several times appointed in said indenture—by virtue of which demise defendant entered. Breach, that on the 13th March, 1838, five hundred and twenty-five dollars and ninety-three cents became due and was unpaid.—Defendant pleaded seven pleas. 1. Non est factum. 2. Deed obtained by fraud. 3. That the demised premises formed a part of a larger tract called the St. Louis Common, which was vested in the inhabitants of that part of the city which was limited on the 13th June, 1812; that by an act of the General Assembly of the State of Missouri, passed March 18, 1835, the sale of the said common was authorized on certain conditions and among those conditions were the following: That the Mayor and Aldermen of the city of St. Louis should cause the said commons to be surveyed and laid off into lots of not less than one acre, nor more than forty, and that they should lay off such roads, lanes, streets, &c., as they should deem necessary and should cause a plat of said survey to be made out and filed in the office of the Recorder of St. Louis county, and that they should give notice of the time, place and terms of sale for four weeks in all the newspapers of the city of St. Louis—that defendant relying on the pretences of the plaintiffs, that all these things had been done, purchased at public auction the demised premises, and that in fact the said Mayor and Aldermen did not cause a plat to be made and recorded, and did not follow the other requisites of the statute, and therefore the deed was void in law.

The fourth plea alleged that plaintiffs sold the lot to defendant without having first obtained the consent of a majority of the owners of lots and parts of lots within the limits

of the town of St. Louis as it was limited on the 13th of June 1812. SEPT. TERM.
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Fifth plea averred that plaintiff sold the lot to defendant without having previously had a plat of the survey of the said common recorded, &c. City of St.
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Sixth plea, that the Mayor and Aldermen did not make to defendant a deed for the lot purchased by him according to the form of the statute.

Seventh plea, that the defendant did not enter by virtue of the demise to him, &c.

On the first and second pleas issue was taken, and plaintiffs demurred to the remaining pleas. Demurrer was overruled, and judgment given for defendant on the demurrer. The whole of these pleas, if I understand them rightly, amount to averments that certain pre-requisites of the statute authorizing the sale of the St. Louis common have not been complied with. No oyer of the indenture was craved nor is the indenture set out, except as it appears in the declaration. No averment in any plea is made, that this indenture was made in compliance with the act of the General Assembly of 1835, nor does so much of the indenture as is set out in the declaration profess to be made under any power given by that act. The Mayor, Alderman and citizens of the city of St. Louis assumed to be proprietors, and although it is not averred that the commons lie within the limits of the city of St. Louis, neither can it be inferred from any thing in the deed, that they were without the limits of said city.

The provisions of the act of March 18th 1835, authorizing the sale of the St. Louis commons, are directory, and not conditions precedent to the power therein vested in the Mayor and board of Aldermen of the City of St. Louis: Therefore in an action of covenant brought by the Mayor, Aldermen and citizens

These pleas amount then to a denial of the title of the plaintiff, and are therefore inadmissible upon well established rules of law. If the pleas had averred that the plaintiffs, were agents, or trustees, and derived all their power over the demised premises from an act of the legislature, and the act of the legislature did not give them any power to make such a deed as was declared on, or was wholly null and void, I am not prepared to say that such a defence would come within the reason of the doctrine of estoppel. This was all that was decided in the case of Mytton v Gilbert (2 term R. 169 172) which has been so much relied on at the bar. I

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regard the provisions in the act of 1835 as directory, and not as conditions precedent to the exercise of the power. If the corporation of St. Louis made the deed to defendant under that act, he shall not and should not be allowed to deny that the preparatory steps required by the act were complied with. He may allege that the corporation of St. Louis derived no power to sell or lease under that or any other act, or that the act was unconstitutional, and in that way, bring himself within the doctrine in *Mytton v Gilbert*.

But the defendants pleas avoid the question of power, and seek to take advantage of alleged omissions on the part of the plaintiffs. They are estopped by their deed from doing this, especially as no complaint is made of any eviction or disturbance.

All the court are of opinion that thes please are bad, and that the demurrer should have been sustained. Judgment reversed.

THOMS V. GREENE.

Assumpsit on a bill of exchange drawn by plaintiff on one S. in favor of defendant, and by defendant endorsed to plaintiff: Held that as no special circumstances were alleged in the declaration rebutting the presumption arising from the position of the parties on the bill, the plaintiff could not recover? Quære whether an action could have been maintained if the facts as they really existed has been alleged in the declaration? viz: That plaintiff signed the bill as drawer without consideration and merely to accommodate defendant, who signed as endorser and endorsed the bill to plaintiff for the purpose of securing the payment of a debt due plaintiff by S. the drawee.

Appeal from the St. Louis Circuit Court.

Geyer, for Defendant.

1. The promise of the defendant was not original, but collateral to pay on the default of Sefton, and within the statute of frauds, *Matson v Wharan* 2 T. R. 80, *Burkmyre v Darnal* 1 Salk, 27, *Anderson v Hayman* 1 H. Bl. 120, *Jones v Cooper*. Cowp. 227, *Chase v Day*, 17, *Johns R.* 114, *Fell on guarantee* p. 31, *Leonard v Vredenburg* 8, *John, R.* 29.

2. The writing made by the defendant in this case does not express the consideration of the promise, and is therefore void,

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Fell on Guarantee 43, Warn and al. v Walten, 3 east R. 10, Lyon v Lamb, Fell on Guarantee appendix no. 3, Saunders v Wakefield 4, Barnw. and A. 595 (6th E. C. L. R. 531) Jenkins v Reynolds 3, Brod. and Bring. 14 (7th E. C. L. R. 328) Moodby v Boothy 11 E. C. L. R. 57 note (3) 2 starkie 602, note (1.) p. 603, 3, Johns, R. 210, 3, east, 10 and cases above cited. 1 Phillips Ev. 439, and 3 Bingham, 107, 3 Dallas 415, 424.

3. Whether the promise of the defendant be within or without the Statute, and whether the writing be sufficient or insufficient, the contract is in writing, and nothing not found in the writing can be considered as part of it. 2 starkie Ev. 81-101. 1st Phil. Ev. 437; 441, Chater v Becket 7, T. R. 201. Fell on Guarantee 15.

4. The writing purporting to be a guarantee given in evidence in this case is incompetent; 1st. because for the reasons, and upon the authorities above cited it is void. 2. because of its variance from the contract set forth in the 4th count; and was not relevant in any other count.

2 Starkie, Ev. 1543. 1 Phil. Ev. 126. Saunders on Pl. and Ev. 960, 535, 672, to 600, 32. 1 Saunders Rep. 211; (n.) 2. Fell on Guarantee. 1 Salks 27, Ld. Ray. 224. Cowp. 227, 2. Wils. 141, 1 Barr 373.

5. This cause having been tried by the court sitting as a jury on the evidence of the plaintiff, the opinions prayed for by the defendant are to be regarded as prayers of instructions to a jury. And if the court ought to have given either of them, the judgment ought to be reversed for that cause.

6. The writing signed by Greene is void, and the court ought so to have decided on the prayer of the defendant. See the reasons and authorities on the 2nd point.

7. The evidence did not sustain either of the three first counts of the declaration, and the circuit court erred in deciding the contrary. Herrick v Carman 10 Johns. R. 224, Bishop v Hayward 4, T. R. 469, 9, E. C. L. 159, 8. The circuit court decided that the plaintiff was not entitled to

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recover on the fourth count of the declaration, but sitting as a Jury afterwards disregarded its own instructions as a court, and found a verdict for the plaintiff on the fourth count. The verdict ought therefore to have been set aside.

9. The evidence did not support the fifth or sixth counts of the declaration and the court ought to have given the opinion prayed for by the defendant. 1. Saunders 211 note (2) 4 E. C. L. R. 264.

10. The verdict ought to have been set aside and a new trial granted.

Spalding for Appellee.

1. The paper signed by Greene was properly admitted in evidence.

2. The court properly refused to declare that paper void.

3. The court properly refused to lay down the law, that Thoms was not entitled to recover on the three first counts. 4 Term Rep. 470; 2 Bos. & Pul. 125; 2 Barn. & Cres. 483; 4 Missouri Rep. 438; 1 Mis. Rep. 95 & 96; Rev. code 522, sec. 31; 4 Mis. Rep. 82.

4. The court did not err in refusing to give an opinion that the issue on the fifth count should be found for Greene.

5. The issue on the 6th count was rightly found for the appellee, and the court did not err in refusing to give an instruction that it should be found for the appellant. Chitty on Bills 81, 79, 82, 595 & 596. 16 John. Rep. 136, 137. 5 Mis. Rep. 525.

6. The finding for plaintiff's on the common counts, and rendering judgment, if error, was for Greene's advantage, and therefore cannot be reversed. 5 Mis. Rep. 525.

Opinion of the Court by Napton, Judge.

This was an action of assumpsit brought by Thoms against Greene, for the amount of three bills of exchange, amounting in all to \$1599 99. The three first counts are on these bills, alledged to be drawn by William Thoms on one John Sefton, in favor of William W. Greene, and endorsed by said Greene to plaintiff. The counts are in the usual form, and aver acceptance, presentment for payment, and notice of dishonor, to Greene, after protest. The fourth count sets out a guaranty, on the part of Greene, that the

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bills should be paid. The bills in this count were described to be fifteen hundred dollars, thirty-three cents. The fifth count was for work and labor, money paid, goods sold, &c., and the sixth on an account stated. Plea non assumpsit.

On the trial, the plaintiff offered in evidence the three bills of exchange described in the declaration, proved their presentment to the acceptor, their protest for non-payment and notice to the defendant.

The affidavit of William Robertson established the following facts: That plaintiff sold a lot of merchandize to Sefton (the acceptor of the bills.) Three drafts each for the sum of \$533 33, one payable in eight months, one in eleven months, and the other in fourteen months, were executed in payment for said goods. The drafts were written by Greene, and presented by him to Thoms for his signature. Thoms objected at first to signing the drafts, stating that he preferred Greene should be drawer. Greene stated that his only motive for wishing them in that form was that he was desirous to appear on the drafts as endorser, being much indebted to the Bank. But he would be responsible for the payment of the drafts at maturity, and would hold himself as liable for their payment as though he was the drawer. The goods were sold by Thoms, in the opinion of the witness, much more on the credit of Greene than Sefton. Thoms would not have sold to Sefton alone, as he knew very little of his affairs and circumstances. Greene appeared much interested in the purchase of the goods, and took a part of them himself. The said drafts were at length signed by said Thoms, endorsed by Green, and accepted by Sefton in the presence of deponent. It was distinctly understood by all the parties, that Greene endorsed said drafts as the surety of Sefton, the acceptor. Greene was the son-in-law of Sefton. Plaintiff also offered in evidence the following paper signed by defendant: "I hereby engage that John Sefton will pay to Mr. Thoms his several drafts dated 12th April, 1833, one at eight months after date for five hundred and thirty-three dollars thirty-three cents, payable to my order at Louisville, Ky., one of equal sum payable at eleven months after date, and one of equal sum payable at fourteen months after date

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making together the sum of one thousand and six hundred dollars. Cincinnati, April 12, 1833, W. W. Greene." This paper was objected to, but was admitted by the court.

After the close of the testimony, the defendant prayed the opinion of the court:

First, That the said writing of the said defendant last aforesaid set forth, was and is void.

Second, That the plaintiff is not entitled to recover on either of the three first counts of the declaration.

Third, That the defendant is not entitled to recover on the fourth count.

Fourth, That on the evidence as aforesaid given, the issue on the fifth count of the declaration ought to be found for defendant; and also on the sixth count.

The court gave the third instruction, but refused the others, and gave verdict and judgment for the plaintiff. Defendant moved the court to set aside the verdict and judgment, because the verdict was against law and evidence, which motion was over-ruled, and exceptions saved to the several opinions of the court.

The material question here, is whether the three first counts of the declaration were sustained. It seems, that Sefton purchased a stock of goods from Thoms, the payment for which Greene was willing to guaranty. For this purpose he drew up three bills for exchange upon Sefton with Thoms as drawer and himself as payee. He then endorsed the bills to the plaintiff, who was the drawer. To make the matter more certain, he executed a separate writing, by which he engages himself to see the bills paid at maturity.

The plaintiff then brings an action on the bills as endorsee, without averring that William Thoms the plaintiff, and William Thoms the drawer of the bills were identical. If this had been averred in the declaration, it would have been bad according to Bishop v Hayward 4. term R. 470. If then the defendant had pleaded that Thoms the plaintiff and Thoms the drawer were one and the same person, this would have been a good plea. The testimony established this fact, and the court was called upon to say that this testimony

Assumpsit
on a bill of
exchange
drawn by

did not support the declaration. The court should have given this instruction. The proof so far from sustaining the three first counts, proved what amounted to a complete bar. But the proof went farther and established that Thoms signed as drawer without consideration and merely to accommodate Greene, but that Greene signed as endorser for the purpose of securing the payment of the amount of the bills to Thoms. This was a special case not warranted by any thing appearing on the face of the bills, and should have been declared on accordingly. The bills purport on their face, according to the law merchant, that Thoms the drawer was the debtor of Greene, and though he became afterwards the endorsee, he cannot recover against Greene, because Greene could immediately recover back against him. Without the allegation of any special circumstances to rebut this presumption arising from the position of the parties on the bill, Thoms cannot recover.

I do not know that it is necessary or proper to inquire, whether the party could on the facts recorded in the bill of exceptions make a good case. Lord Kenyon said in *Bishop v Hayward*, "I admit that a case might happen in which the plaintiff might have stated that he was substantially entitled to recover on this note, for example, that his own name was originally used for form only, and that it was understood by all the parties to the instrument that the note though nominally made payable to the defendant was substantially to be paid to the plaintiff; but if such were the case the note should have been declared upon according to its legal import as was held in *Minott v Gibson* (H. Black R. 569.)"

This is substantially the case at bar, and yet in *Britten v Wilson v. Webb*, (2, Barn and Cress. 483,) the plaintiffs declared on a bill of exchange, drawn by the plaintiffs upon one F. W. endorsed by the plaintiff to defendant and re-endorsed by him to the plaintiffs, and averred, that at the time of drawing the bill it was agreed that the name of the defendant should be endorsed upon the bill as a security to the plaintiffs for the due payment thereof, by F. W. and that the bill was so endorsed under such agreement, and that the endorsement by plaintiffs was without

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plaintiff on one S. in favor of defendant endorsed to plaintiff:

Held, that as no special circumstances

were alleged in the declaration rebutting the presumption arising from the position

of the parties on the bill, the plaintiff could not recover. Quere,

whether an action could have been maintained if the facts as they really existed had been alleged in the declaration viz:

that plaintiff signed the bill as drawn without consideration and merely to accommodate defendant,

who signed as endorser and endorsed the bill to plaintiff for the purpose of securing the payment of a debt due plaintiff by S. the drawee?

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consideration. The usual averments of presentment for payment, protest for non payment &c. were also made. This declaration was demurred to, and all the judges held the declaration bad. It was held that plaintiffs could not recover on the bills, because by the custom of merchants, the plaintiffs as drawers were liable to pay the contents to the defendant, and if the action was founded on the special contract, it could not be maintained, because it did not appear that there was any consideration for the defendant's endorsement. Holroyd J. in his opinion, expressly referred to the decision in *Bishop v Hayward*. If this decision is to be looked upon as a judicial interpretation of the previous opinion in *Bishop v Hayward*, Lord Kenyon's dictum in that case in relation to the special action which he supposed maintainable, must be taken with a very important limitation. A consideration for a special agreement, altering the actual position of the parties on a bill, must be averred and proved.

The *guaranty*, offered in evidence under the fourth count, was properly rejected by the court, because of variance. No judicial interpretation upon the meaning and effect of the word "*agreement*" used in our statute of frauds has ever yet been made in this State. As the question does not arise in this case, I will not consider it here.

The common counts for money paid, money had and received &c. cannot help the plaintiff's case. The bills, in my opinion, did not support either the 5th or 6th counts, because they purported that the plaintiff was the debtor of defendant and if he paid them, he was only paying his own debts. Judgment reversed.

McGirk, Judge.

I am of opinion that in the foregoing case, Greene is responsible as endorser to Thoms.

EXE'RS OF SHOBE V. MORRIS.

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The judgment of the Circuit Court will not be reversed on the ground that the verdict was against the evidence, unless it clearly appears that the evidence did not warrant the finding of the jury. (See Singleton v Mann, 3. Mo. R. p. 464. Oldham v Henderson 4. Mo. R. p. 295. Martin v Withington ib. p. 518. Mulliken v Greer, 5. Mo. R. p. 489. Steel v McCutchen, ib. p. 522. Vaughn v Montgomery, ib. p. 529.)

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Bates for defendant.

It is submitted that the motion for a new trial was erroneously refused.

Campbell for Appellee.

1st. The weight of testimony as preserved on the record is decidedly in favor of the verdict of the jury.

2. Two juries after full and fair trial upon the merits having given a verdict in favor of the claim of said Morris for sums of which the verdict now appealed from is the smallest, and both the county court and circuit court having refused to grant new trials, this court cannot now legally grant a new trial unless there appear upon the record the most manifest error, or flagrant injustice in verdict.

3. There is no such injustice in the verdict in this cause as would justify this court to invade the province of the jury. Mo. Dec. vol. 1, page 464.

Geyer, on the same side.

1. The circuit court could not lawfully grant a new trial to the appellants, one new trial having before been granted to the same party, it not appearing that the jury erred in a matter of law, or was guilty of misbehavior.

2. The verdict rendered is not against the weight of evidence; on the contrary, the services are established by the evidence on both sides—the only difference being in the estimate of the value of those services, and the weight of evidence would entitle the appellee to a larger amount than the sum found by the jury.

3. Though the Supreme Court will reverse the decisions of the circuit court in granting or refusing a new trial, it will reverse them only where it manifestly appears that the court below exercised its discretion unsoundly, McKnight

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and Brady v. Wells 1 Mo. R. 14. Singleton v. Mar, 3d do. 464. Oldham v. Henderson, 4 do. 295. Martin v. Withington, ib. 518. Mulliken v. Greer, 5 do. 489. Neel v. McCutchen, ib. 522-3. J. R. 170, 271. Graham on new trials 380.

Opinion of the court by Tompkins Judge.

Morris the appellee filed in the county court of St. Charles county an account against the estate of the deceased, Abraham Shobe, and obtained there a judgment for \$1915. The executors moved for a new trial, and their motion being over ruled, they appealed to the circuit court of that county. In the circuit court Morris obtained a judgment for \$1373. The executors again moved for a new trial, and their motion being over ruled, they appealed to this court.

The bill of exceptions shows the account filed by Morris in the county court against the estate. It was for services rendered to the deceased in his life time, beginning on the 9th day September 1830, and ending on the 10th day of April 1836, (deducting five months in the year 1831,) in attending to the business of the deceased, and in taking care of his son Jesse. For these services the plaintiff Morris charged the sum of \$1915. There was also an item in the account of \$25 for a gun.

George Barns, a witness for Morris, stated that sometime in the month of February 1836, he was at the house of the deceased, and having had a previous acquaintance of 5 or 6 years with Morris, he enquired of Mr. Shobe, since deceased in what capacity Morris was there: that Mr. Shobe said he mended gates, ploughs, &c., and said that he had a great deal of such work to do, and among the rest he attended to his son Jesse; that he had more influence over Jesse than any other person had; that Ned was a good fellow, and he would pay him well: that Jesse Shobe seemed to be deranged in his mind and subject to violent excitement; that he took offence at some remark of the witness, and was several times in the night noisy and violent: that Morris was a carpenter; the witness had known him 5 or 6 years, and that he was formerly employed in making shingles, and in hewing

that the witness saw him engaged in some such work at Mr. Shobe's.

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Wm. Palk, another of Morris' witnesses stated, that in the spring of the year 1833, he commenced practice as family physician in Mr. Shobe's family, and that he was at the house of Mr. Shobe about twice in each week till the death of Mrs. Shobe, and that sometimes he was there once in each day for near a month; that Mrs. Shobe died in 1834 or 5. After her death, he lived more than a year in Mr. Shobe's family; that when he was first there, he found Morris there as one of the family, and that he continued there till the spring of 1836; that he was repeatedly told by Mrs. Shobe, and by Mr. Shobe, that the business of Morris was to take care of Jesse Shobe; that Jesse Shobe was the son of the deceased and aged about forty years; that he was subject to violent epileptic fits, which came on him sometimes monthly, sometimes weekly, and sometimes daily, and by night as well as by day, whenever he was much excited, or had eaten too freely; that he was deficient in memory, and "*non compos mentis*;" that he was in such a condition as to require a constant keeper to watch him, and that persons who were well acquainted with him could frequently see when the fits were about to come on, and by taking him out, and amusing and exercising him, the fits could sometimes be kept off; that there was during the fits a great rush of blood to the head, and he required frequent bleeding; that he was an able bodied man, and in other respects healthy enough; but that his life would have been endangered if he had not been constantly watched; that Morris attended him, and watched him, and when at home slept with him for the purpose of taking care of him, understood his case well, could bleed well, and knew how to prevent the fits when they were likely to come on; that Jesse Shobe was much attached to Morris, and that Morris had more influence over him than any other person; that Morris frequently took him out to hunt to exercise him and divert his mind; that he frequently did this of his own accord, and sometimes at the request of the deceased; that Morris was a first rate nurse, and his services were rated very highly by Mr. Shobe.— This witness also testified that Morris was much employed

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in other business of the deceased, as in attending to his stock, and doing many other things which it is perhaps needless to enumerate.

Mrs. Tatum, another witness for Morris, stated that in 1830, she became acquainted in the family of the deceased, and that Morris was there at that time; that in 1831 she went to live in the family of the deceased, and continued there till 1834, and speaks of the services rendered by Morris in such terms as the last witness had done; that in the spring of the year 1832, Morris was preparing to join Capt. Boon's company of rangers; that she heard the deceased request him not to do so; and he said that he would give him more than he could get by going with the rangers; that she never knew the deceased to give Morris any money, nor Morris to receive any thing, except some few articles of clothing furnished him by Mrs. Shobe. Ira Tatum testified that he was a neighbor to the deceased; that he had known Morris to be at the house of the deceased, but did not know how he was employed there; that he had employed Morris to assist him in building a steam mill; that Morris was a good workman in wood; that this witness gave him one dollar and fifty cents per day and found him, (his boarding perhaps;) that he was well satisfied with Morris's services at that price; that another person had afterwards employed him at one dollar and twenty-five cents per day and found him. Morris was employed by these persons after he left the house of the deceased in 1836.

Several witnesses produced on the part of the defendants, appellants here, testified as to the manner of life that Morris led at the house of the deceased, Abraham Shobe; they stated that he seemed to have no particular employment, that he kept his horse and gun, and amused himself as he pleased; that the deceased was a wealthy man owning many slaves, two of which were good at working wood and iron, and that several of them had influence over the deceased son Jesse Shobe, and understood very well how to treat him in his disordered state of health. These witnesses thought that the services of Morris in the family of the deceased were not worth more than his boarding and lodging in the house

of the same. A grand son of the deceased stated that in the spring of the year 1834, he went to live with his grandfather to attend to his business, and sometimes went to school; that he slept in the same room with Jesse Shobe, and that Morris when there slept with him Jesse; that Morris told him that the deceased gave him twenty-four dollars to buy a gun.

Another grandson of the deceased testified that in the spring of the year 1836, he, at the request of the deceased, went to live with him in order to attend to his business. That in April of that year, Morris left the house of the deceased; that the deceased becoming very feeble left his own residence in October of that year, and went to the house of his daughter in Gasconade county, where he died early the next year; and that the time of the departure of the deceased from his own residence was generally known in the neighborhood. Another witness on the part of the defendants stated that he had seen Morris at work at Shobe's place; that Morris was frequently hunting and riding about, and sometimes with Jesse Shobe; that when the deceased left his own place of residence in 1836, it was generally understood that he would never return, he being very infirm; that he was in company with Morris, and remarked to him that it was generally reported in the neighborhood that he, Morris, was to get \$250 per year from Mr. Shobe; that Morris replied it was not so, that there was no such contract between them, and that he would be well contented to get that sum.

The reasons assigned for a new trial are, that, 1st, The verdict is against law; 2d, against evidence; 3d, without sufficient evidence; 4th, that the amount allowed is excessive. No instructions asked or given are complained of, and whether a new trial is to be granted is to be determined altogether by the weight of evidence. The only evidence of a contract betwixt the deceased and the appellee Morris, is the declaration of Mrs. Tatum that in the summer of the year 1832, when Morris intended to join Capt. Boon's company of rangers, she heard the deceased request him not to do it, and say that he would give him more than he could make by going with the rangers. That a very different va-

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The judgment of the circuit court will not be reversed on the ground that the verdict was against the evidence unless it clearly appears that the evidence did not warrant the finding of the jury, (see *Singleton v. Mann*, 3 Mo. R. p. 464. *Oldham v. Henderson*, 4 Mo. R. p. 295. *Martin v. Withington*, ib. p. 518. *Muliken v. Greer*, 5 Mo. R. p. 489. *Steel v. McCutchen*, ib. p. 522. *Vaughn v. Montgomery*, ib. p. 529.

lue should be fixed on the services of an individual employed as Morris was, in the family of the deceased, is not strange; and for that reason this court ought not lightly to disturb a verdict, which to say the least, has the sanction of two juries; and which, two courts, after hearing the testimony, each refused to set aside, and to grant the appellants a new trial. This court sees nothing but the written evidence of the case. Two of the witnesses on the part of Morris lived in the family of the deceased whilst Morris was employed there. The opportunities of these persons to acquire information of the value of Morris' services, as well as of the value set on them by the deceased was good, and their character for veracity is not impeached. Those two witnesses rated the services of Morris to the family of the deceased very highly, and they also declare that the deceased placed a high value on them. The testimony of Ira Tatum is calculated to give a very favorable opinion of the character of Morris, as well as of the value of the services that such a person might have rendered on the farm of a wealthy farmer, such as the deceased appears to have been. It will be recollected that Tatum employed Morris, soon after he left the family of the deceased, to assist in building a steam mill at one dollar and fifty cents per day, and found him; that Tatum said he was well satisfied with the services of Morris at that price, and found him to be an industrious man; that during the following winter, Morris was employed on the same mill, by the mill-wright, at one dollar and twenty-five cents per day, and that his *labor was satisfactory to the mill-wright*. It does not seem probable that a man who had passed six years of his life in so idle a manner, as some of the witnesses think Morris did at the house of the deceased, could suddenly become so laborious and correct in his habits as to give satisfaction to one who employed him at the rate of one dollar and fifty cents per day in very heavy work. The presumption, then, it seems to me, ought to arise that Morris had not passed six years at the house of the deceased, next before he was employed by Tatum on the mill, in the indulgence of idle habits. Much deference has always been shown by this court to the verdict of a jury

on questions of new trials. But in the present case there have been two verdicts for the plaintiff, Morris, one of the jury in the county court, the other of a jury in the circuit court; and each of those courts refused the appellants a new trial. Those courts too, hearing and seeing the witnesses deliver their evidence, had many advantages over this court in forming a correct estimate of the weight of evidence on each side of the question. Then as the jury did not find the verdict contrary to any instructions of the court before which the cause was tried, and as it does plainly appear to me, that the evidence would not warrant the finding, it is my opinion that the judgment of the circuit court ought to be affirmed, and that being the opinion of the other judges of this court, it is accordingly affirmed.

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CURLE v. McNUTT.

Petition in debt will not lie on a note which does not show on its face when it became due. To maintain suit on such a note it is necessary to make an averment of the time when the note became due, and no such averment can be made in this form of action.

Appeal from the St. Louis Circuit Court.

Darby for Appellee.

The record appears to be correct, and it is difficult for me to see what points arise in the case. There can be none, save the over-ruling the demurrer, and that will appear to have been properly decided by the circuit court. 5 vol. Mo. decisions, Hamilton adm'r of Rundlett vs. Stewart, p. 266.

Opinion of the Court by Tompkins, Judge.

McGirk, Judge, did not sit in this cause.

John McNutt brought his action under the statute against Richmond J. Curle in the circuit court. He had judgment there, and to reverse that judgment, Curle appeals to this court.

The note set out in the petition of McNutt is as follows: On the first day of January I promise to pay John McNutt or order the sum of, &c. The defendant Curle demurred,

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Petition in debt will not lie on a note which does not show on its face when it became due. To maintain suit on such a note it is necessary to make an averment of the time when the note became due, and no such averment can be made in this form of action.

and the circuit court over-ruling the demurrer gave judgment for the plaintiff.

It does not appear by the face of the note sued on in this action when it became due. In this the petition was defective; the declaration made at the close of the petition, that the debt remains unpaid, and therefore, &c., does not help the appellee; as it ought to appear that before he sued, he had a right to demand payment. The judgment of the circuit court should have been for the appellant.

Its judgment must then be reversed, and in disposing of the cause we are led to enquire whether in this statutory mode of proceeding the plaintiff can, if the cause be remanded, amend his petition by making an averment that the first day of January next after the date of the note was the day on which the parties intended the note to become due. The act declares that any person being the legal owner of any bond or note for the direct payment of money or property may sue thereon, &c., by petition in debt. The form is then given, viz: "the plaintiff states that he is the legal owner of the bond or note against the defendant to the following effect. The copy is then inserted, and the petition concludes as in the record, "yet the debt remains unpaid, therefore he demands, &c." The third section of the act provides how assignments may be set out in case there be any, and that the instrument sued on shall be filed with the clerk together with the petition.

Our act is a copy of that of Kentucky, and under their act, the courts of that State decide, that no averments can be made in this form of suit. In the case of Dallam and Castleman vs. Wilson the court of appeals say, "petition and "summons will not lie against Castleman and Dallam & co. "on a note signed Castleman, Dillon & co. If the persons "are the same it must be shown by averment which cannot be made in this form of suit." For say that court, "this "summary proceeding applies only to writings which on "their face are plain and unequivocal evidences of a contract "for the direct payment of money between the parties to "the writings. In Kinkaid vs. Higgins, 1 Bibb 352, it was "adjudged that the statute admits of no averment, &c."

Great respect is certainly due to the decisions of the courts of that state on a statute which we have every reason to believe was, as it were, transplanted from that state into this; for much the greater part of our population migrated thence; but our own legislature seem themselves to have intimated, by declaring how assignments of such instruments should be set out, their intention that no other change should be made in the form of the petition. The intention of the framers of the act was to simplify the mode of proceeding at law for the collection of debts. This intention is expressed in the title of the first act, viz: of January 1825. For the reasons above given, it is my opinion that the plaintiff should have declared on this note as at common law. Judge McGirk does not sit in this cause on account of a legal disqualification; but Judge Napton concurs in opinion. The cause will then be remanded to the circuit court, and that court will dismiss the suit because the statutory action of petition in debt does not lie on the instrument of writing here sued on.

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CURLE V. PETTUS.

Petition in debt will not lie on a bond containing other stipulations than those for the payment of money or property: therefore this action cannot be maintained on a bond given for the hire of slaves, and containing besides a promise to pay a certain sum of money at a certain time, a stipulation for clothing the slaves, paying their taxes, and for returning them at the expiration of the period for which they were hired.

Appeal from the circuit court of St. Louis county.

King & Tunstall for defendant Curle.

The circuit court erred in this cause in overruling the demurrer filed herein. See 4 Bibb Rep., the case of Wright vs. Coleman page 252 and 253: also 7th Monroe's Rep'ts, Townsend vs. Burgher, pages 224 and 225, and particularly at the bottom of page 225; also, 6th Monroe's Kentucky Reports page 335, and 1st Bibb's page 252, and the statute of Kentucky upon which those decisions are founded, 2nd volume of their digest page 319.

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2. The circuit court erred in setting aside the judgment against Pitman in this case upon motion of plaintiff's attorney.

Darby for Plaintiff.

The decisions of Kentucky, generally on this statute, are inapplicable to the law of Missouri, because the statute is different. But even the decisions of Kentucky will sustain the view I have taken of the case, and show conclusively, that the circuit court decided correctly in over ruling the demurrer in this case. *Kinkaid vs. Higgins*, 1 Bibb 352.—*Pool vs. McCaughan* 6 Mon. 336. 2 vol. Brown and Morehead p. 1320.

In the case before the court, no averment was necessary. No evidence was required, except the exhibition of the note, for the direct payment of the money. *Casey vs. Barcroft*, 5 vol. Mo. decisions page 128. 2 vol. Mo. Decisions, *Johnson vs. White*, page 223.

Opinion of the Court by Tompkins, Judge.

Pettus sued Curle in the circuit court of St. Louis county in the statutory action called petition in debt. Judgment was given for Pettus on a demurrer filed by Curle to the petition.

The bond on which the suit is brought is in these words: On or before the first day of January next we Richmond J. Curle and David R. Pitman promise to pay to William G. Pettus five hundred and sixty three dollars, being for the

Petition in debt will not lie on a bond containing other stipulations than those for the payment of money or property: therefore this action cannot be maintained on a bond given for the hire of slaves, and containing, besides a promise to

hire of negroes &c. for one year, who are to be clothed, taxes paid, and returned to said Pettus on the first day of January next, dated 1st January 1838, and signed &c. by the parties. It might be well enough to close here by referring to what is said in the opinion delivered at this term in the case of Curle against M'Nutt, as a reason for the disposition about to be made of this cause. But on referring to the case of *Coleman v Wright* found in 4th Bibb p. 252, we find a case precisely similar to this now before us. In that case the court of appeals for the State of Kentucky say "we are of opinion that the objection is well founded." viz: that the action was misconceived; for, continues that court,

"The act of assembly which gives the remedy by petition, confines it to cases for the direct payment of money. A bond or note therefore upon which a petition will lie, must be such as may be correctly described to be a bond or note for the direct payment of money; and as the note in this case contains not only a stipulation for the payment of money, but also for the clothing of the slaves, it is plain that it cannot be correctly described as a note for the payment of money only; for the whole note, and not a part only should come within the description, and the whole of its stipulations must therefore be taken into consideration, in determining the aptitude or correctness of the description."

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pay a certain sum of money at a certain time, a stipulation for clothing the slaves, paying their taxes, and for returning them at the expiration of the period for which they were hired.

Our statute giving the remedy by petition varies from that of Kentucky only as it confines the remedy to the cases of bonds or notes for the direct payment of money or "*property*," and to use the language of the Kentucky court, the note sued on in this cause cannot be correctly described as a note for the direct payment either of money, or property, because it contains in addition to the promise for the direct payment of money, a stipulation for the clothing, paying taxes and return of the said slaves.

The same disposition then, that was made of the case cited from the Kentucky reports, it seems to me ought to be made of this cause, that is to reverse the judgment of the circuit court and remand the cause in order that the plaintiff in that court may have leave to discontinue his action. Judge Napton concurring in that opinion, the judgment is accordingly reversed, and the cause remanded for the purpose aforesaid.

FERGUSON v. THE MAYOR, ALDERMEN &c. OF THE CITY OF ST. LOUIS.

In a suit against the Mayor, Aldermen &c., of the city of St. Louis, on Treasury Warrants of that City, the plaintiff should allege in his declaration a demand on the City Treasurer, and not on the defendants.

Error to the Circuit Court of St. Louis county.

Bird for Plaintiff.

The plaintiff here insists that his declaration is good, and

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that judgment below should be reversed and final judgment given here for plff.

Ferguson.

Drake for defendant in error.

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The declaration alleges no presentation of the warrants at the Treasury for payment. Murray v Judah, C. Corren 490, Mohawk Bank v Broderick in 10 Wendell's R. 306, Bayley on Bills p. 219.

Opinion of the Court by Tompkins Judge.

Ferguson brought his action of assumpsit against the Mayor, Aldermen &c. of St. Louis. A demurrer was filed to the declaration, which the circuit court sustained, and gave judgment for the defendants. Ferguson prosecutes this writ of error to reverse that judgment.

The declaration states that the defendants were justly indebted to him in the sum of six hundred dollars, on two treasury warrants so called, drawn by Richard Dallan auditor of the City of St. Louis, one of them to pay Charles Collins, or bearer four hundred dollars for &c. out of any money in the Treasury not otherwise appropriated; the other warrant drawn by the said auditor directing the said Treasurer to pay to Charles Collins or bearer one hundred dollars for &c. out of any money in the Treasury not otherwise appropriated, both of which bore date at St. Louis &c. The declaration then goes on to state that these warrants came to the hands of the plaintiff for a valuable consideration, and that afterwards &c. the plaintiff presented the warrants to the defendants for payment who undertook, and promised to pay &c. The breach is then assigned viz: that they did not pay. The plaintiff shows on the face of the declaration that the money demanded was not the individual debt of the defendant. The demand of payment should have been made of the Treasurer, and if he did in reality demand, and the plaintiffs did literally promise as it is stated in the declaration, that promise being made without any consideration does not entitle him to maintain an action. He should have demanded the money from the Treasurer, the officer whose duty it was to pay. It can scarcely be credited that the plaintiff did not know that the drafts ought

In a suit against the Mayor, Aldermen, &c., of the City of St. Louis, on Treasury warrants of that city, the plaintiff should allege in his declaration a demand on the city treasurer, and not on the defendants.

to have been presented to the Treasurer and consequently that such presentment ought to have been averred in the declaration. The circuit court in my opinion committed no error in sustaining the demurrer. The judgment of that court is then affirmed.

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McKINNEY'S ADM'R. v. DAVIS.

Where a demand is presented to the county court for allowance, against a decedent's estate and disallowed, the decision of the court is a judgment, and is attended with all the legal consequences of a judgment of a court of record at common law: consequently, if the claimant neglects to prosecute his appeal in the manner pointed out by the statute, the matter becomes res-adjudicata, and he is forever barred.

Appeal from the St. Louis Circuit Court.

Spalding for Appellant.

1st. The circuit court did not err in opening the judgment of the county court and granting a new trial. Rev. Code 63, and particularly sec. 8.

2d. The circuit court erred in deciding that the first judgment in the county court was not a bar to the second suit. Rev. Code 155, 156, 157, and also pages 55 and 56. 1 Phillips' Evidence 242; and 1 Starkie's Evidence 208.

3d. The circuit court ought to have granted a new trial, as the verdict was against law and evidence.

Geyer for Appellee.

1. It does not appear by the record of the county court, that in the decision excepted to, that court erred in any material question of law or fact, and the judgment of the county court ought therefore to have been affirmed; and though it should appear that there was error committed on the new trial, yet as the result is precisely that of affirming the judgment of the county court, no error has been committed for which the judgment can be reversed, certainly none by which the appellant is injured. Rev. Code, 1835, p. 63-4.

2. The merits of the case are clearly with the appellee as is manifested by the verdict of two juries; and a judgment

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rendered upon such finding ought not to be reversed, unless there is very manifest error.

3. No error was committed by the circuit court in rendering judgment for the plaintiff on the verdict. The record of the county court does not show either the nature of the demand, or the amount presented in the former proceeding; nor is there on that record any decision as to the particular demand. These matters it is attempted to supply by parol evidence against law.

Opinion of the Court by McGirk, Judge.

This case comes here by appeal from the circuit court of St. Louis county. The case was commenced in the county court of St. Louis county, and originated as follows, to wit: At the May term of the county court for St. Louis county 1838, on the 3rd day of the term, Davis, by his attorney, presented to the court for allowance against the estate of S. T. McKinney an account for \$221 43 founded on the following receipt, to wit: St. Louis, May 27th, 1834, R'd of E. Davis two hundred and twenty one dollars 43 cts. S. T. McKinney. On the validity of this demand the parties had a regular jury trial in the court, and a verdict and judgment were given for the plaintiff, Davis, in that court for the amount, and the administrator took the case to the circuit court, where the plaintiff Davis again had a verdict and judgment, to reverse which the cause is brought here.

McKinney, the appellant and administrator, alleges, that the circuit court committed error on the trial of the cause in refusing to decide that the plaintiff's Davis, demand was not barred by reason of it having once before been before the county court and disallowed. This question, as I conceive, is the chief and main question to be decided by this court.

Before this question can be fairly gone into, a previous question which arises must be determined, which is a question of fact to be determined, by an inspection of the record. It is insisted by Mr. Geyer of counsel for Davis that the record does not shew that this case was ever adjudicated on and disallowed by the county court.

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This court has looked into the record sent here from the circuit court, and by the record and the evidence contained in the bill of exceptions, we are satisfied the plaintiff's claim was once before on a trial in another case, different from the present suit, fully tried by the county court and disallowed, and from that disallowance the plaintiff Davis took no appeal, but submitted to the same, expecting to redress his grievance by a new suit. It may here be remarked that Davis made no objection in the circuit court to the evidence given to prove a former trial. It appears by the record that a part of that evidence was record evidence, and a part was oral evidence. The circuit court was called on to decide and declare the law to be, that when a demand is once regularly laid before the county court for an allowance against the estate of a dead person and disallowed that such disallowance is a bar to a subsequent suit for the same demand, which the court refused to do, but decided that a new suit might be brought for the same thing. To determine the correctness or incorrectness of this decision, a view of the statute creating county courts and defining their powers, must be resorted to. In page 156 R. Code 1835, sect. 15, it is declared, that the county courts shall have and possess the following powers (after naming other things): *Sixth*, To hear and determine all suits and other proceedings instituted against executors and administrators, upon any demand against the estate of their testator or intestate, where such demand shall not exceed one hundred dollars.

Seventh, Concurrent jurisdiction with the circuit court, in all such cases where the demand shall exceed that sum, subject to an appeal to the circuit court, in all cases. By this enactment the county court clearly and legally had jurisdiction of the subject matter of this suit.

By the 21st section of this article the court is declared to be a court of record. In page 56, R. Code, 1835, sect. 8, it is enacted that the county court shall have jurisdiction, to hear and determine all demands against any estate, and a concise entry of the order of all allowance shall be made on the record of the court, which shall have the effect and force of a judgment.

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The 9th sect. requires all claims to be proven by competent legal testimony before they can be allowed, and either party may preserve such testimony by bill of exceptions.

The 13th sect. empowers the court, or rather commands the court, to hear and determine all demands in a summary way, without the form of pleading.

The 20th section requires that when a demand is allowed, the clerk shall endorse on the back of the paper *allowed*, and deliver the same to the party. But nothing is said as to what shall be done when the demand is rejected.

It is argued that the county court is a court of statutory jurisdiction, and therefore its jurisdiction ought not to be enlarged by construction. This rule being admitted, does not settle the question before the court. The true question is, what is the legal effect of an act clearly authorised to be done when the law has omitted to declare the effect. The

Where a demand is presented to the county court for allowance against a decedent's estate and disallowed, the decision of the court is a judgment, & is attended with all the legal consequences of a judgment of a court of record at common law:

Consequently, if the claimant neglects to prosecute his appeal in the manner pointed out by the statute, the matter becomes res-judicata, and he is forever barred.

act declares *allowances* made by the court shall have the effect of judgments. The counsel then argue that the law makers believed it would not have been so, or they would not have so declared it; and the counsel farther infer, that such would have been the case because the law-maker has so declared it. I am of opinion that if the statute had been silent in respect to the effect of an allowance made by the county court, yet the effect would have been of consequence equal to a judgment. The county court is one of the constitutional courts of the State, and by statute has a portion of judicial business conferred upon it, and the manner and time of exercising that business are by statute declared and pointed out.

Then in all cases where the effect of its acts are not declared by statute, we must look to the common law for the effect. I then take the county court to be a court of record, possessing power to hear and determine all demands against the estates of intestates, in a summary way without the form of pleading, and to allow or disallow the same. That is exactly what has been done in this case.

I take the law to be well laid down in 1 Starkie on Evidence, which is, that a judgment by a court of competent jurisdiction upon the same matter between the same parties

and for the same purpose is conclusive, 1 Starkie 208; same book 211—it is said that the allowance by the commissioners of a bankrupt is conclusive, referring to Doug. 407.

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So the judgments of ecclesiastical courts, though not of record, are conclusive. So the decision of a private arbitrator, to whom the parties have referred themselves, is binding on the subject matter. 1 Starkie 211. These, says the book, are instances in which the adjudications, though not of record, are final.

Then Starkie, in the same page and 212, says, that a matter is not less *res adjudicata*, because it is not of record, *that is*, because it is not preserved and authenticated in a particular manner, &c.

As to the matter having been given in evidence, the citation by Mr. Spalding, of counsel for the administrator, from 1 Philips Evidence 242, is in point.

To suppose the act of the Legislature, which says the county court shall hear and determine all demands against the estates of deceased persons, intends only that their orders, allowances, &c., shall be of force only where the amount is allowed, would be giving a liberty to claimants against the effects of dead men, never by law given to persons where the debtors are alive. The consequences would be hurtful to the rights of justice and perplexing to society. According to common law rules, the disallowance in this case is a bar. The statute does not declare it to be otherwise, and if it is holden to be otherwise, it will be by construction and implication growing up, against the justice and equity of the statute, and against the peace of society. For these reasons, I am of opinion that the circuit court erred in giving judgment for Davis, and that the same ought to be reversed with costs of suit. Judgment reversed.

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vs

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THOMAS v. Cox to the use of BELTZHOEVER.

1. A plea alleging an assignment of the instrument sued on, by the plaintiff to a third person, should state the form of the assignment for if the instrument was verbally assigned the assignee could not sue upon it in his own name.
2. The 2nd section of the act concerning "bonds and notes" (R. C. 1835, p. 105,) making bonds and promissory notes, for money or property assignable, does not apply to covenants which are left as at common law—not assignable so as to enable the assignee to sue thereon in his own name.
3. A plea of surrender of a term and acceptance thereof, in an action of covenant, should state that plaintiff accepted the same in discharge of the covenant, as nothing will discharge a covenant but a performance or discharge under seal.

Appeal from St. Charles circuit court.

Bates and Campbell for Appellant.

1st point. An instrument of writing, such as the one on which this suit is brought, under our statute may be legally assigned, so that the suit should be brought in the assignee's name.

2nd. An instrument of writing, such as the one now sued upon, may be surrendered by words without writing.

3rd. Verbal testimony is competent to prove a surrender of such a lease as that now in controversy.

4th. The court ought to have granted a new trial in the cause.

5th. The declaration of the plaintiff is materially defective. Authorities—Revised Code, page 105, sec. 2. Do. 284, sec. 9. 2nd Blackstone's Com., page 327, sec. 10. 2 Chitty, page 535-6 and note. 1st do. page 107.

Coalter for Appellee.

The first point which arises in this case is on the demurrer to the first plea, and this I maintain was properly sustained by the court. 6th Cranch, page 82, Lewis vs. Harwood. 1st vol. Rev. Code of Virginia of 1819, page 484.—Force's adm'r. vs. Thomason, 2nd Littell's Reports page 166 and Holbert vs. Deering, and Brooks vs. Deering, same book, vol. 4, page 9.

The next point arises on the demurrer to the second plea this plea is that the house and premises mentioned in the lease were destroyed by fire before the termination of the

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lease, and therefore Thomas was not bound to pay. There is no doubt that a tenant is bound to pay rent, notwithstanding the destruction of the house by fire, unless there is a special exception in his lease, that in case of fire he shall not be bound to pay rent. Comyn on landlord and tenant pages 115 and 119.

The next point is on the surrender which he says he made to Cox. This plea certainly is a nullity. Statute of frauds, section 9.

The other points are on the exclusion of testimony. The deed to Jonathan L. Bean, and the written statement of James B. Bowlin were properly excluded, because they had no relevancy to any of the issues. The statements of Magehan and McKee were properly excluded for the same reason, and because they went to prove a verbal conversation with Beltzhoover about the premises, and a surrender to him verbally, if they prove any thing. The receipts of Busby were properly excluded because they were not competent unless a judgment and executions were shown, by which he was authorised to receive the money.

Opinion of the court by McGirk Judge.

In the St. Charles circuit court, Cox, to the use of Beltzhoover, brought three actions of covenant on the same writing against Thomas and two others. The suits are nearly alike in all respects.

The actions are founded on an article or agreement under seal, by which, Wm. Cox bargains and contracts as follows: (to wit,) "I William Cox, for and in consideration of the sum of one thousand dollars to be paid as hereinafter mentioned do hereby assign and set over to Jonathan Thomas, John Dawson and Isaac Rubel all the right, title and interest which as assignee, I have in and to the following premises, (here the premises are described being a house and lot in St. Louis,) which I now hold under a lease from Arthur L. McGinnis, dated April 1st, 1835, for the full and complete term of four years from the date thereof." At the end of this clause the covenant proceeds as follows: (to wit,) "and the said Jonathan Thomas, John Dawson, and Isaac Ruple, for them-

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selves their heirs, executors and assigns, do hereby covenant to and with the said Cox, and his heirs, to pay the just and full sum of one thousand dollars for the unexpired term of said lease to said Cox, which is three full and complete years from the first day of April 1836, in quarterly instalments or payments, and that they will at the end of said term return unto said Cox the aforesaid house, messuages or tenements, in as good order and repair as they received it usual wear excepted. Witness our hands and seals." Then the same is signed and sealed by all the parties.

The breaches assigned are, that said parties entered into the enjoyment of the premises immediately, and that Cox fulfilled all things on his part, but that the defendants on the 1st of April 1839, five hundred dollars being then due, failed to pay the same, &c., wherefore he is injured, &c.

The writ was served on Thomas, who appeared and cravedoyer of the covenant sued on, and on it being read, he pleaded several pleas, the first of which is, that after the making said covenant, on the 27th day of July 1837, the said Cox assigned all his right and interest to the premises aforesaid to one Frederick W. Beltzhoover, and this the defendant Thomas is ready to verify, wherefore he prays judgment, &c.

2nd plea is that the premises were without fault of defendant burnt down.

The 3rd plea is that at the time the indenture was made, the defendant paid Cox all rent due, (to wit, \$100,) up to 31st of July 1836, and that the defendants then surrendered the balance of the term to Cox, the plaintiff, who then and there accepted the said surrender, and this the defendant is ready to verify, &c.

4th plea is payment and issue joined to the country, and this is found against the defendant.

There is a demurrer to the three first pleas. The court sustained the demurrer to the defendants three first pleas, and gave judgment for plaintiff, to reverse which the cause is brought here by appeal.

The first question made by the defendant in the court below is whether Cox could assign his interest in the leased

premises, and yet sue in his own name to the use of Beltzhoover. It is argued that the plaintiff could no longer, after the assignment, use his own name. I consider that this view of the matter is wrong. The plea says, Cox assigned and made over all his interest to the premises, and to the indenture to one Frederick Beltzhoover, and argues therefore that Beltzhoover, as assignee, should sue in his own name, and that the suit should not be Cox to the use of Beltzhoover.

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A plea alleging an assignment of the instrument sued on, by the plaintiff to a third person, should state the form of the assignment, for if the instrument was verbally assigned the assignee could not sue upon it in his own name.

There are in my mind several objections to this plea. In the first place the form of the assignment is not alleged; the plea does not shew whether the assignment was written, printed, or verbal. If it were verbal, I am of opinion no suit could be brought on it in the name of the assignee direct. This is one reason why I deem the plea bad. At common law this covenant would not be assignable, so as to enable the assignee to sue in his own name. The statute has made some rights evidenced by paper assignable. But it has not made all rights assignable. In Rev. Code 1835, page 105, sec. 2. The statute declares that "all bonds and promissory notes for the payment of money or property, shall be assignable, and the assignee may maintain an action thereon in his own name against the obligor or maker for the recovery of the money or property specified therein, or so much as may have been due at the time of the assignment, in like manner as the payee or obligee might have done. Why the legislature did not see proper to make every possible kind of obligation secured by paper writing, assignable is not for me to say. They have left out all covenants, and there can be no doubt that the writing sued on in this case is a covenant in the strictest sense of the common law, and that it is not a bond nor note, for the payment of money or property merely, then not assignable. Then, as at common law, the payee might sell his right to have the money, and with it he might sell the purchaser the right to use his name to recover the money with.

The 2d section of the act concerning "bonds and notes," (R. c. 1835, p. 105,) making bonds and promissory notes, for money or property, assignable, does not apply to covenants which are left as at common law—not assignable so as to enable the assignee to sue thereon in his own name.

This is enough to put the question of assignment to rest. I am of opinion that on that plea the court committed no error. I will now examine the plea of surrender which was

A plea of surrender of a term and acceptance thereof, in an

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demurred to by the plaintiff. The plea nowhere asserts the fact that the lot, &c., was surrendered to and accepted by Cox, in satisfaction of the defendants obligation to him to pay the \$1000. It is a well settled rule in law that nothing will discharge a sealed covenant but a performance or discharge under seal. Here no such thing is alleged—the plea says Cox accepted the lease, but for what it does not say; whether in satisfaction of his demand is not said. For these reasons the plea is bad, and the circuit court of St. Charles committed no error on this point.

As to the other demurrer, it was not relied on, and I have not seen any thing in it. Judgment affirmed.

a performance or discharge under seal.

BIRD v. MONTGOMERY.

1. The claim of the inhabitants of the town of St. Charles to the commons adjoining the town, conceded to them by the Lt. Governor's of Upper Louisiana in 1797, and 1801, and surveyed by the Surveyor General of that province in 1804, was confirmed by the act of Congress of June 13th, 1812.
2. The rules of the common law are inapplicable to the construction of grants and concessions of the royal domain, during the Spanish government of Upper Louisiana.
3. In the case of a complete grant, of a part of the royal domain, by the crown of Spain, the dominion retained by the King was purely political, and not proprietary. In the case of the St. Charles commons, however, there was no such complete grant, but a mere concession or inchoate title had been made, and the King of Spain undoubtedly retained so much proprietary right as would have authorised him to restrict or modify, though not, perhaps, entirely to abrogate, the commons. This proprietary interest passed to the United States, and they parted with all their interest by the act of June 13th, 1812.

On Appeal from the St. Charles circuit court.

Bird in propria persona.

1. That the title under the inhabitants of St. Charles is the better title. Arredondas case, 6th Peter, s Rep. 727 &c. 10 Martin's Rep. 416, Baldwin v. Stafford. Act of 13th June 1812, and letters of Clement B. Penrose and Thomas F. Riddick, 2d vol. U. S. State papers, pages 446-7-8 & 9.

2. If this is not the case, the plaintiff's title under *Giguare* is better than that of the defendant under *Piper*. United

States vs. Perehoman, 7 Peters Rep. from 86 to 91. Arredondas case, 6 Peters Rep. 735, 736. Smith vs. U. S. 10th Peters Rep. 330, 331.

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3. It was the custom of the Spanish Government to grant to every established post, town, or village, land sufficient for commons; and these commons were held so sacred, that by law they were declared to be inalienable *even by the King*. Strother vs. Lucas, 12th Peters Rep. 440, 441. 10th Peters Rep. 724, 5, 6, 7, 730-1, 735, 6 and 7. As to effects of a survey made prior to 10th March 1804. See act of Congress of 1814, Geyer's dig. page 475 and our act of ejectment.

4. This claim to commons was confirmed by act of 13th June, 1812, and whether it vested in the inhabitants of St. Charles a fee simple, or a mere usu-fructuary estate, it vested in them such a right as would enable them to maintain ejectment. 3d M. R. 303, 304, 308—673; 5 M. R. 198; 11th do. 207; 3d do. 460.

5. The commons having been so confirmed, could not have been thereafter granted to another by Congress or the Recorder. Arredondas' case 6th Peters Reports, page 738, and the cases there cited.

6. Piper having neglected to file and have recorded, before the 1st July, 1808, his notice, and the documentary evidence in support of his claim, his claim is forfeited, and no evidence can be here received in support of it against a grant from the United States, and no subsequent act of Piper, of Recorder Bates, or even of Congress, could so revive his claim as to affect the right of commons already confirmed. Acts of Congress of 1805, 1806, 1807, 1812, 1813, 1814. Geyer's Digest, pages 454, 459, 461, 462, 464, 470, 471, 474, 475. Also case of Strother v. Lucas, 12th Peters Rep. 448, 449.

The acts of Congress above referred to in every case (except in favor of those who were at the time of filing notice, *actual settlers* on the land claimed) argue that notice should have been filed before the first day of July, 1808. The fact stated by Piper that he offered to file his notice, but the recorder refused to receive it, because unaccompanied by a

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plat of survey, furnishes no excuse for not filing his notice. The recorder acted as by law he should in refusing to record the notice. The act of 1806 repealed so much of the act of 1805, as required the notice to be accompanied with a plat of survey of the land claimed, and extended the time of filing notice. It was again extended to 1st July, 1808, by act of 1807. After this no further time for filing notice was given except to those who were in 1812 *actual settlers* on the land claimed, and the record shows that Piper *was not such actual settler*, either in 1808 or 1812. Piper's notice not having been filed according to law, must be regarded as not filed at all.

7. The proceedings before the commissioner and the recorder, bear upon their face the most conclusive evidence of fraud on the part of Piper, and that Recorder Bates in reporting this claim as confirmed according to any law, acted most clearly under a mistaken view of his powers, and in manifest violation of the laws under which he acted, and as no patent has issued, courts of justice may look behind the confirmation, and determine who has the better title. *Sacket vs. Hooper*, 3 Lou. Rep. 107. 4th Lou. Rep. 272. 5 Lou. R. 177. 7 Peters Rep. 738 & the cases there cited.

8. Although it is admitted that neither the claim of the plaintiff under Giguare or the defendant under Piper is good *as against the commons*, yet it does not lie in the defendants mouth to dispute the title of Giguare under which he claims, and procured his confirmation.

The claim of the commons aside then, the plaintiff has the better title under the original claimant. 8 Martin's Rep. Rep. 619, &c.

9. The court erred in rejecting the evidence offered as appears, by the bill of exceptions.

Gamble for Appellee.

First—The claim of plaintiff and defendant under the concession to Giguare:

1. That if the confirmation to Piper could be disregarded, then the plaintiff's claim under Giguare being an unconfirmed claim is barred. 4 sec. act of 2 March 1805, in 2 Story's laws U. S. 967. 5 sec. act of 3 March 1807, in 2 S. L. U.

S. 1060—13 June 1812; “ “ 1260; “ “ 3 March 1813; “ “ 1307; “ “ 26 May 1824; 3 Story L. U. S. 1959.

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2. The confirmation to Piper is conclusive on this title, being equivalent to a grant from U. S. against which this claim of plaintiff's cannot be set up. 12 Peter's Rep. 454.

3. The plaintiff objects to the notice filed as being without warrant of law. This cannot now be questioned. The boards constituted to act on these claims acted judicially, and no person can question their proceedings collaterally; and further, the notice so far as it was of any importance, is put beyond any question by the act of 1816, which confirms this claim as reported for confirmation, that is as the claim of James Piper.

Secondly, we consider the titles as between the commons and the title under the confirmation to Piper. My positions under this second division of the contest are;

1. That no grant of commons has been found.
2. That no use or enjoyment of any specific land as commons has been found.
3. That the survey by Mackay is no legal designation of the claim to commons.
4. That the act of 1812 confirms no claims to commons but such as existed under the Spanish government.
5. That if commons existed under the former government in the inhabitants of St. Charles, it was in connexion with other persons owners of property in the vicinity, and consequently the St. Charles part of the commoners could not alien any part of the land.
6. That if the right of common existed, it was an incorporeal right, and was distinct from the fee in the land.
7. That the sovereign, while such right existed, aliened the fee to the persons under whom defendant claims.
8. That if the right of the commoners was alienable, the alienee would only take the incorporeal right, and could not maintain ejectment for a disturbance.
9. That if the claim to commons is asserted as a grant by the act of 1812, then the Spanish law has nothing to do with it, and the rights under such grant are to be regulated by the common law.

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10. By the common law, the plaintiff here, as claiming a right against the grantee of the government, has only the easement, and cant bring an action of ejectment. Authorities on above points. 2 Partidas—act of 28th Dec. 1832, authorizing the Trustees of St. Charles to sell the commons; 14 sec. of act 26 March, 1804; 2 Story L. U. S. 939.

Opinion of the Court by Napton, Judge.

This was an action of ejectment, for 800 arpens of land, lying in the county of St. Charles. Judgment being against the plaintiff below, he appeals to this court.

The circuit court found a special verdict, which sets out the following facts :

In the year 1806, Edward Hempstead, as agent for the inhabitants of the town of St. Charles, filed a notice with the recorder of land titles of the claim of the inhabitants of said town to fourteen thousand arpens of land, as commons, which notice was recorded. This notice set forth their claim, as under a concession from Don Zenon Trudeau in 1797, and from Charles Dehault Delassus in 1801 and 1804.

With this notice Mr. Hempstead filed and had recorded sundry documents :

1. A petition from Charles Tayon, dated 11th January, 1797, to the Lieut. Governor Trudeau for a tract of land fronting on the crooked swamp in the low prairie, and extending to the Missouri, adjoining on one side to Antoine Janis, and on the other side to lands not heretofore granted.

2. An answer of said Trudeau, which states that said land petitioned for "being in the vicinity of the village of St. Charles, and of various farms in the prairie of its dependency which would have to go a great deal further to procure wood, said tract shall remain, as well as all others adjoining either in ascending or descending the Missouri, and which have been asked by sundry persons addressed to us by Mr. Tayon, to the Royal Domain, and for the common use of the said village of St. Charles, and for the lands already granted in the prairie, and to be granted hereafter; all which Mr. Tayon shall make known to the inhabitants, and especially to those who have asked for land and whose petitions

I herewith return." This letter was dated January 23, 1797. SEPT TERM
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3. The proceedings of the villagers of St. Charles, at a solemn meeting at their government house, in which they resolve to enlarge their commons, and they fix the boundaries. Having determined this matter, it was further agreed, that it was proper that the result of their deliberations should be communicated to the Lieut. Governor, and that he be supplicated to preserve to the said inhabitants of St. Charles of Missouri, their upper and lower commons, in their whole and entire state, and they will bind themselves to enclose the same as they have done heretofore." This paper was signed by all the inhabitants. Bird
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4. The answer of Charles Dehault Delassus, the then Lieu. Governor, is as follows: "St. Louis of Illinois, 26th February, 1801. All concessions and augmentations of property must be granted by the intendant of these provinces, on a petition, which is to be presented by those persons claiming lands; but if the common of the inhabitants of St. Charles is not sufficient for their cultivation, we do permit them provisionally to enlarge the same according to their wishes, without insuring to them the right of property, which they are to apply for as above mentioned, and the provisional lines of the said augmentation shall be drawn by Captain Antoine Soulard, Surveyor of Upper Louisiana, who is the only person authorized to survey under our orders. It being well understood that nothing shall be done to the prejudice of any person. Signed Carlos Dehault Delassus."

5. A letter from Delassus; dated 23rd Feb'y 1804, to Mr. Charles Tayon, commandant of the post of St. Charles, rebuking said Tayon sharply, for not communicating to him the petition of the villagers of the 27th April 1801, asking a survey of the commons, and referring to his decree of 26th Feb. 1801, by which he says, "the augmentation therein mentioned is granted to them," he proceeds to direct Mr. Tayon to notify persons who have surveys made in the commons asked for, of his intention that the land should be granted as common, and ordering him to take the necessary measures to have the whole surveyed according to his de-

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cree. This letter is certified to be a copy of the original, by James Mackay, and that the same was presented to him, (Mackay) by the citizens of note of the village of St. Charles, whilst he was commandant of said village.

6. The petition of the villagers of St. Charles to the board of commissioners on land claims for Upper Louisiana, in which they ask a confirmation of 14000 arpens, and beg the board, if it should be thought that their powers did not extend to cases of this kind, to make the proper representations to Congress, to enable them to get a confirmation.— This petition is dated Feb. 3, 1806. The certificate of the recorder is appended to these papers.

7. A plat of survey of the 14000 arpens, to which was the following certificate: "I Don Antoine Soulard, particular surveyor of the establishment of Upper Louisiana, certify that there was bounded, measured and — with the approbation, and in presence of Messieurs the Syndics of the town of St. Charles of Missouri, a majority of the inhabitants of said town assisting, the land which is designated on the preceding plat of survey, conformably to the petition which they made on the 18th January 1801, and to the decree of Mr. Lieu. Governor, which provides that they shall be put in possession provisionally by means of the plat and certificate thereof of the quantity of land necessary for a common of extent sufficient to answer the people of that establishment, and having calculated the extent, after having performed the operations, it resulted in containing 14000 arpens superficie, measured by the perch of the city of Paris of eighteen lineal feet in length of the same city, according to the field measure of this province, which land situated on the left shore of the river Missouri, and about twenty-one miles north west of this town of St. Louis is bounded as follows: (here follows the boundaries,) which is done in virtue of the decree of Mr. the Lieu. Governor, and sub-delegate of the royal domain, Don Carlos Dehault Delassus, of date 26th Feb'y 1801, and that all the matter above referred to may appear, I give the present with the preceding plat of survey drawn in conformity with the labors performed by the Lieu. Surveyor Don James Mackay of date of the 27th

and of the days following of the month of February of the present year, which conforms to the minutes which I authenticate. St. Louis of the Illinois on the 2nd March 1801, signed Antoine Soulard." I Antoine Soulard, particular surveyor of Upper Louisiana, certify that the preceding plat and certificate agree in the whole with the originals, which remain deposited in the archives of the office of survey in my charge, to which I refer, signed, &c.

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The special verdict finds further, that certain proceedings were had on this claim before the board of commissioners, which proceedings are set forth on the record. From these it appears that the testimony of some witnesses was taken, which conduced to establish the importance of the said commons for the convenience of the villagers of St. Charles. It also appears that the claim was rejected by the commissioners. The verdict also finds certain documents to be correct translations of the original, extracted from the records of the recorder of land titles of the United States. These documents are, 1st. A petition from Isadore Lacroix, a merchant of Michilimackinack, to Zenon Trudeau, Lieu. Governor, dated 17th January 1797. This petitioner prays for a concession of a lot near St. Charles and a piece of land at Marais Croche, where he desired to locate. Mr. Tayon writes, in relation to this petition, to the Lieu. Governor, that the lot asked by Lacroix was on the King's domain, but that the land at Marais Croche "has been reserved for the use of the lands in the prairie of the jurisdiction of St. Charles."

2. A petition from Don Antoine Gautier, to the Lieu. Governor, dated Nov. 29, 1796, praying a concession of land at two places, one at a place called Clear Weather Swamp, and another of ten arpens front on the borders of the same, running so as to join the Marais Croche. The Lieu. Governor Trudeau thereupon orders the surveyor, Antoine Soulard, to put said Gautier in possession. But an order of Don Antoine Soulard, dated 17 January 1803, appears, in which he states in consequence of expected difficulties between this petitioner and the inhabitants of St. Charles and Portage des Sioux, and in conformity to official instructions given him by Delassus, then Lieu. Governor, Don James

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Mackay as his deputy is ordered to measure the same quantity of land mentioned in the petition of Gautier on some other vacant place of the King's domain. The special verdict finds the following facts as admitted. "Said Bird claims the land in dispute under the inhabitants of St. Charles, and also by deed from the heirs of Auguste Francois Giguare. Defendant was in possession at commencement of this suit, claiming title to six hundred arpens under said Giguare. It is admitted that whatever title one Pierre Lord ever had in said six hundred arpens is now vested in Matthew Kerr, under whom defendant holds. It is admitted that whatever title the inhabitants of St. Charles had in the premises in dispute is now in the plaintiff. It is admitted that whatever title Auguste Francis Giguare died seized of, is now in plaintiff."

The court further finds a certain ordinance enacted by the corporation of St. Charles, providing for a conveyance to Gustavus A. Bird, and a conveyance made pursuant thereto. It is also found, that the premises mentioned in the declaration are within the limits of the St. Charles commons as surveyed by Mackay in 1804.

The special verdict also finds, that on the 15th day of December 1808, James Piper filed and recorded in the office of the recorder of land titles, a notice and affidavit, setting forth said Piper's claim to 800 arpens, under a concession from Delassus, 14th May 1800, and cultivation in the years 1801, 2 and 3, and avering that the notice of the said claim had been presented to the recorder Donaldson, about one month before the first board of commissioners commenced their session, and was rejected by said recorder, because no plat of survey accompanied the same. With the said notice and affidavit, said Piper filed and recorded a petition of Auguste Francis Giguare, praying for 800 arpens of land upon such part of the King's domain as shall be most convenient to his interests, which petition was dated 12th May 1800, and filed and recorded a concession by the Lieu. Governor on 14th May 1800, conceding the petitioner the land he asked for, so that it prejudiced no one else, and ordering the surveyor to put the petitioner in possession of the quan-

tity of land he asked, in some vacant part of his Majesty's domain, and to make out a plat of survey, so that petitioner might make out his title, &c. Piper also filed and had recorded first, a deed from Giguare to one Pierre Lord, dated Dec. 4, 1804, and second, a deed from said Lord to Piper dated 5th Dec., 1804.

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The board of commissioners rejected this claim in 1811. In 1813, the recorder of land titles, acting as commissioner, took up this claim, and proof was made to him that some improvements were made on this tract in 1803, and in 1815 this claim was reported by said recorder for confirmation.

It is found, that on the 4th of December 1804, Francis Giguare was not 25 years old, but probably about 19—that thirty-five years since, one Durocher lived upon the land in dispute, and after his death Louis Barada lived there, and after Louis Barada died, Antoine Barada lived upon the land until he was turned out by Matthew Kerr, about two years since—that for the last thirty-five years, James Piper has not lived on said land, but lived about two, (or ten) miles from the land, towards Portage des Sioux, where he lived until his death. The court found, that Louis Barada took possession of said land, having purchased a claim to it under said Durocher, saying he considered it belonging to the commons of St. Charles, but he would risk it; and Antoine Barada, whilst he possessed said land, said it belonged to the commons. The land was surveyed for the first time in 1830.

On this state of facts, the circuit court gave judgment for defendant.

Before enquiring into the legal effect of these documents, it is proper to notice an objection raised to the sufficiency of the special verdict. The court have found that Mr. Hempstead, as agent for the inhabitants of St. Charles, filed sundry documents in the office of the recorder of land titles, which documents are not declared to be genuine, but are merely set forth on the record. The act of Feb. 1, 1839, concerning evidence, provides, "that all grants and concessions of land, all warrants, orders, plats and certificates of survey, made and signed by the proper officer of the French or Spanish government, which shall have been filed in the

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office of the recorder of land titles by virtue of any law of the United States, being certified by such recorder to have been recorded in his office, shall be received in evidence without further proof." By the act of Congress of March 2, 1805, all persons having grants, or incomplete titles under the French or Spanish government, were required to file their concessions, surveys and other evidences of title with the recorder of land titles, before the first of March 1806. The time was extended by subsequent acts of Congress.—These documents were found by the court to have been filed in the proper place, and were therefore under our act of assembly admissible in evidence without further proof than what appears on this record. It would seem to be a strained interpretation of this verdict to suppose that the court, whose duty it was to find facts, should have intended to leave the question as to the genuineness of these documents to mere inference. Not, however, being entirely satisfied on this point, we waive the further consideration of it for the present, and proceed to enquire into the legal effect of these documents, supposing them to be well found.

The record presents two separate claims of title, first the title of plaintiff under the inhabitants of St. Charles, and second, plaintiff's title under Francis Giguare.

We will consider the title of the commons first. It appears, then, that in 1796 and 1797, various persons petitioned the Lieu. Governor Trudeau, for concession of land in the neighbourhood of St. Charles, and these petitions were all refused, on the ground that the Lieu. Governor intended an indefinite quantity of land in that neighborhood should be reserved for the use of the villagers of St. Charles and its dependencies in the prairie. It appears also that the inhabitants of St. Charles in 1801, in solemn meeting, resolved on enlarging their commons, and fixed upon the limits of the commons so enlarged, and petitioned Delassus, the then Lieu. Governor, for a concession of the entire commons. Delassus in his answer to this petition, makes a provisional grant, not pretending to assure them the right of property, which he declares in his decree is only in the power of the intendant of the provinces. He also directs the surveyor of the

rown to run out the lines, in accordance with the wishes of the inhabitants. This is accordingly done by James Mackay in March 1804, and is authenticated by the public surveyor under whom Mackay was deputy.

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The act of the 13th of June 1812, declares that the rights, titles, and claims, to town or village lots, out lots, common field lots and commons, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles &c. which lots have been inhabited, cultivated, or assessed prior to the 20th day of December 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according their several rights in common thereto."

The only question is whether this act confirmed the claim of the inhabitants of St. Charles to a common of 14000 acres, and would enable them, and all holding under them, to maintain an ejectment on such title.

It is insisted by the defendant, that the act of 1812 operated to confirm the titles of claimants only where there was a grant from the Spanish Government, or such long use and enjoyment of a specific quantity of land as would amount to a grant. This position is believed to be correct. But if it is intended by the word 'grant' to exclude all inchoate titles, such concessions as were made by the representative of the Spanish government, and which did not purport to confirm all the proprietary rights of the crown, the doctrine appears to be entirely untenable. If the grant from the King of Spain in this case, to the inhabitants of St. Charles, or in any other case, was a complete grant and parted with all ownership, the rights of the commoners or the rights of an individual, under such a grant, would have been completely protected by the Treaty of 1803 between this Government and France, and no act of Congress would have been necessary to give validity to such claims. The act of

Delassé speaks of *claims* rights and titles, and the object of the act was to divest the United States of all ownership or interest in such property as comes within its provisions. In this case, there was not only a claim to an indefinite quantity of land as far back as 1796, and which was recognized

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The claim of the inhabitants of the town of St. Charles to the commons adjoining the town, conceded to them by the Lt. Governors of Upper Louisiana in 1797, and 1801, and surveyed by the Surveyor General of that province in 1804, was confirmed by the act of Congress of June 13th, 1812.

by the proper authorities of that day, but a more distinct and definite claim, set up in 1801, and expressly conceded by the proper officer, so far as he had authority to make such concession. The rights of the crown of Spain were reserved in the concession of Delassus, and this government acquiring all the right and ownership which Spain and France ever had, thought proper to relinquish all their interest and confirm the concession of the Spanish commandant. But this claim is fixed not merely by a petition and concession, but a survey made by the proper officer, before the actual transfer of upper Louisiana in 1804. This claim is confirmed by the concession and survey, and all the documents relating thereto were pursuant to the act of 1805, filed in the office of the recorder of land titles. It was then not only an existing claim under the Spanish Government, founded on a concession from the representative of the crown, but a claim recognized upon this Government by a compliance with the requisitions of the law, and brought to the notice of its duly constituted agents. With all these facts appearing on the records of the Government, and filed in the archives of its officers and functionaries, congress passed the act of 1812, confirming all claims to commons of certain villages enumerated in the act. The claim of the inhabitants of St. Charles to 140 arpens of commons, conceded in 1801, by the Spanish officer Delassus, and surveyed by the Spanish surveyor Soulard in 1804, and laid before the Board of commissioners in 1804, was in the opinion of this court confirmed by this act.

The objection to the want of a sufficient user of the commons, does not arise when there has been a concession, and if such an objection could arise, there is, I think, abundant evidence on this record of the user established in 1776, and thenceforwards, was of an indefinite quantity of land, and if no subsequent acts of the inhabitants and of the Spanish government had reduced the claim to any more certain limits, than all the land "up and down the Missouri river," the limits might not have been available any farther than particular limits could have been established by competent evidence. But in 1801 the claim and the user were reduced to certainty by a petition, containing a special description by metes and bounds, and a consequent survey in 1804.

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It is contended, however, that if the commons existed under the Spanish Government in the inhabitants of St. Charles, it was in connexion with other persons, owners of property in the vicinity, and consequently the St. Charles part of the commoners could not alienate any portion of the land. This argument appears to be founded on certain expressions used by the Lieu. Governor Trudeau in 1796 and 1797, in refusing to make concessions of lands, lying within the limits of the commons, to certain petitioners. The replies of Trudeau, to Mr. Tayon, to Lacroix, and to Gautier, speak of St. Charles, and "*lands in the prairie of its dependency*," or lands in the prairie of the jurisdiction of St. Charles." The application in 1801 was made by the inhabitants of the town of St. Charles, the concession of Delassus made to them and to no others, and the act of 1812 confirms the commons to the inhabitants of the towns and villages therein enumerated. If the expressions of Trudeau in 1796 are calculated to convey the idea that certain farms in the vicinity of St. Charles were dependencies on that village, and as such were entitled to share the privileges of its inhabitants, they only go to show that the occupiers of such farms constituted a portion of the inhabitants of St. Charles, and as such were entitled to a beneficial interest in the grant confirmed from congress. Be this as it may, the difficulty, if any exists, is entirely foreign to any question properly arising on this record. Who the inhabitants of St. Charles are, and who can take under that description of persons, is of no consequence to the merits of plaintiff's title. It remains to be considered, what estate or interest the inhabitants of the town of St. Charles acquired from the King of Spain, or by grant or confirmation from the United States.

On this head, the defendant assumes two positions. First, that the right of common, as it existed under the Spanish Government, was an incorporeal right, distinct from the fee, and if claimed in this shape will not sustain an action of trespass. And second, that if claimed under the act of 1820, as a grant from the United States, its character must be determined by the common law, which clearly could not

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royal domain,
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authorize an action. In examining the first proposition, it is clear that the use of terms derived from feudal custom and feudal tenures would be inapplicable and inappropriate. To speak of "fees" and "incorporeal hereditaments," as applicable to a people, whose usages and laws were foreign to the countries in which the feudal system prevailed, and were derived from a very different origin, must tend to produce confusion of ideas. It is to be regretted, that the absence of authorities on this point, leaves the nature of the laws and customs prevalent in Spanish America, somewhat uncertain, and the only sources of information accessible to the court are such extracts from Spanish compilations as have been engrafted and commented on in various decisions made by the supreme court of the United States.

It seems to have been the custom with the Kings of France and Spain, to grant to towns and villages a portion of land contiguous thereto, as a common, for the supply of fuel for the commoners, and to furnish pasturage for their cattle, and the King himself could not alienate such common. *Strother v. Lucas*, 12 Peter R. 44. *New Orleans v. United States*, 10 Peters R. 724, 730. A careful examination of the laws and usages of both these countries, led the supreme court of the U. S. to the conclusion that these sovereigns could exercise a certain jurisdiction over these common and other places similarly situated, but it was purely a police regulation. *New Orleans v. the United States*, 10 Peter R. 7. Indeed, what kind of proprietary interest can we imagine, existing in the crown which is inalienable? The very terms of an absolute dominion imply the power of alienation. The dominion retained by the King of Spain, then, was not proprietary, but purely political—a dominion never severed from the sovereignty of our country, and nowise consistent with the absolute ownership of a subject.

In the case of a complete grant, of a part of the royal domain, by the crown of Spain, the dominion retained by the King was purely political, and not proprietary. In the case

It is needless, however, to enter into any minute inquiry in relation to the exact nature of the ownership of the commoners, under the Spanish Government. Whether common real or incorporeal, it was absolute and allodial; and not according to the feudal understanding of that term, was standing in the King or any one else. This is upon the

position of a complete grant, but in the present case there was no such complete grant. A mere concession or inchoate title had been made, and the King of Spain undoubtedly retained so much proprietary right as would have authorized him to restrict or modify, though not perhaps entirely to abrogate, the commons. This proprietary interest passed to the United States, and they parted with all their interest by the act of 1812. The political dominion, if the phrase be admissible, has passed into the State of Missouri.

If then, under the King of Spain, the rights of the commoners were purely incorporeal, they unite under this government, to that intangible interest the absolute proprietorship, ceded by the United States.

The arguments to establish that these commons are inalienable, even by the commoners, I apprehend, are founded on this supposed intangible nature of the right. If the positions which I have advanced be correct, the foundation upon which these arguments are based, is gone. Indeed the whole argument seems at variance with the spirit of our laws, and contrary to the genius of our political institutions. The general spirit and tendency of our government and laws, no judicial tribunal is at liberty entirely to disregard. A construction which tends to perpetuities, will not be favoured. Whilst every thing else is progressive, whilst our most solemn political charters may be altered or abolished by the power which created them, and one generation is denied the power of binding its successors, shall a few French villagers be compelled to stand still in the march of improvement, and abide by a system of customs, which experience and necessity and more enlightened views have taught them to disregard?

It is the opinion of the court, that the legislation of this State may provide the ways and means, by which the inhabitants of St. Charles may dispose of this property. Whether they have done so, in this instance, and whether the law, if such an one exists, has been complied with; is immaterial in this case. The admissions on the record preclude the defendant from questioning the conveyances from the inhabitants of St. Charles to Bird.

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of the St. Charles commons, however, there was no such complete grant, but a mere concession or inchoate title had been made, and the King of Spain undoubtedly retained so much proprietary right as would have authorized him to restrict or modify, though not, perhaps, entirely to abrogate, the commons. This proprietary interest passed to the United States, and they parted with all their interest by the act of June 13th, 1812.

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Entertaining this view of the title under the commons, it becomes useless to examine the titles under Giguare. Piper's claim was not reported for confirmation until 1815, and if confirmed at all, was not confirmed until 1826. It must yield to a previous confirmation in 1812 of the same land to the inhabitants of St. Charles.

The judgment of the circuit court is reversed, and the clerk will enter up judgment for the plaintiff.

KYLE appellant v. HOYLE appellee.

1. Where the issue tendered by one of several pleas was immaterial, and the demurrer thereto improperly over ruled, and no issue was joined on such plea, and the jury found for the plaintiff, the issue which they erroneously supposed to be joined on this plea, and the verdict was fully sustained by the finding of the other issues for the plaintiff, the Supreme court refused to reverse the judgment on account of the finding of the jury on such supposed issue. It was the fault of the defendant to tender such an issue, and it did not appear that he sustained any injury by such finding.
2. Where it is necessary to prove a demand and refusal, an instruction that the refusal must be of a *definite* character is erroneous, as it would be in the power of the defendant, by evasive answers and equivalent conduct, to render it impossible for the plaintiff to prove a *definite* refusal.
3. A covenant to make and deliver a deed, in the demand of the covenantee, is broken by the first refusal to comply with the terms of the covenant in this respect, and a right of action immediately accrues against such covenantor, and to this right there can be no bar but accord and satisfaction, or a release.
4. K. covenanted with H. to convey to him certain property for a certain consideration, and, in part payment of the consideration, received from H. two acceptances of D's for \$10,870 00, without the endorsement of H. On account of the doubtful circumstances of D. these acceptances were taken as \$5,000 00. H. delivered the acceptances to K. who converted them to his own use, and refused to perform his covenant. In an action of covenant, the court held the measure of damages to be the full amount expressed on the face of the acceptances, and interest on the same at the rate of ten per centum from the time they became due. Napton Judge dissenting on this point.

Appeal from St. Louis Circuit Court.

Spalding for Appellant.

1st. The jury having found for the appellee on the 4th

plea, when there was no rejoinder and no proof either of a demand of rents, the judgment is erroneous and should be reversed.

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2d. The instructions given by the court below are wrong. 2 Stark. Ev. 568. 4 Hen. and Mun. 440.

3d. The instructions asked for by the defendant below ought to have been given.

4th. The verdict was excessive. 3 Cranch 298. 3 Wheat 200. 6 Wheat. 209.

Allen on same side.

The inquiry is, what is the measure of damages on behalf of plaintiff:—it is insisted that the measure of damages is the profit made by Kyle on those acceptances, and having exchanged them for real estate, the plaintiff is entitled to recover in this action the value of such real estate, and the jury actually gave damages to the amount of \$13,014, this verdict was rendered on 23d Dec. 1839.

This rule of damages is denied by defendant, and on his part it is insisted that the true rule is the value of the property contracted to be conveyed at the time of default in making the conveyance, which value is either that which is proved in evidence, or that set on it by the parties in their contract, as the one or the other may be most advantageous to the plaintiff, and if the latter, interest on same from time of value being paid.

The damages in a case like the present is one of calculation, not one of vindictive damages, or smart money, nor is it one wherein damages for deceit or fraud if any in the case is to be recovered.

The value of the property as proved was ten thousand dollars. Interest on this at 6 per cent from 1st June '37 to 22d Dec'r '39 would with principal amount to \$11,538 34; and at 10 per cent to \$12,563 90. Take from these sums the order on Natchez of \$4000 never paid, and the amount would be in lieu of the first \$7,163 01, of the second \$7,538 35, shewing an excess in damages by this calculation of at least \$5,475 65.

If these views be correct they dispose of the instruction given by the court, touching the measure of damages, and

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the 5th reason assigned for a new trial, unless that instruction be agreeable to the view taken above on that subject, and if so, then they shew the reasons 1st, 3rd and 4th assigned for new trial were well taken and in either case that the reason 4th assigned was well taken.

We come now to consider the refusal of the court to give the instructions asked by defendant, and in support of those instructions, the defendant relies as to 1st on the law of Va., incorporated in the bill of exceptions, and as to 2nd on the well settled principle that one may waive what is for his own benefit unless prejudicial to others. Authorities,—3 Cranch 298 and n. 6 Wheat. 109. 3 do 200. 2 Peters Dig. 1 sec. 2. 2 do 4. 3 do 32, 33, 34. 5 do 48. 5 Am. L. G. 330. 3 Carnes Rep. 111. 4 Johns do 1. 1 Miss. do 552. 3 do 391.

Geyer for Appellee.

1. There is nothing in the terms of the covenant requiring the plaintiff to make a demand of rent, before bringing suit, nor was he required to aver a demand in his declaration.—No such averment was made, the fourth plea therefore tendered an immaterial issue, and the demurrer thereto ought to have been sustained. 1 Chitty's pl. 287.

2. Whether the demurrer to the plea was properly overruled or the plea be regarded as wholly unanswered, is immaterial. The plea assumes to answer, and answers only a part of the breach, and the plaintiff is entitled to recover for the failure to make the deed, although there be no right to recover rents.

3. The 3d rejoinder to the first replication to the several pleas of tender, admits the action pending in, &c., and that it was a lien at the time of the breach, and avers as a bar to an action for that breach, a release of the property from the lien after the bringing of this suit, and the demurrer to that rejoinder was therefore properly sustained.

4. The issues on the first and second rejoinders of the defendant were well taken to the country, because the laws of Va., and the effect of those laws as well as the existence of the suit, are matters of fact; but if the issues were improperly taken to the country, the fault is with the defendant

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by whom they were tendered, and he cannot now complain, especially after verdict. Revised Code, 1835, page 468. 1 Chitty 482.

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5. The testimony of Mrs. Brown was in all respects competent—she was not disqualified on account of interest.—She had formally released her interest, if any she had, before she was sworn, and she was sworn and examined without objection.

6. The first instruction asked by the defendant was properly refused.

7. That instruction was not authorised by the facts. The laws of Virginia as well as the decisions of their court prove the existence of a lien in such cases.

8. The second instruction was also correctly refused.

9. If the instruction was intended to mean what its language imports, that the jury were to inquire into matters subsequent to the breach, as constituting the waiver, it was clearly wrong, because it was not in issue. 1 Chitty 429.

10. This instruction assumes that a demand and refusal was proved, and the issue on the second plea maintained for the plaintiff—but that the jury must find for the defendant in that issue, if they find a matter of discharge not pleaded, and not in issue. It was a mere abstract proposition.

11. The two first instructions given by the court amount to nothing more than a direction to the jury, to find the issues according to the facts, as they appear to them in evidence. If any thing the first instruction was too strong for the defendant in requiring the plaintiff not only to prove a demand and refusal, as averred by the plaintiff, and denied by the defendant, but requiring the proof that the refusal was of a definite, (i. e. certain, exact, precise,) character.

12. The third instruction given did nothing more than to declare, 1st. That a tender of a deed, if proved, would not defeat the action, if the land was incumbered by a legal or equitable title, or a lien at the time of such tender, and this is admitted by the rejoinders of the defendant, and second, to refer the decision of the question of fact to the jury, according to the issue tendered by the defendant, and made between the parties. If the replication setting up the lien

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was bad, it ought to have been demurred to; if good, and that is admitted by the rejoinder, the instruction cannot be wrong.

13. The measure of damages was correctly stated in the last instruction given by the court. The general rule in all such cases unquestionably is, that the plaintiff shall be restored to all he has lost by the breach, and in the case of a part payment, the amount advanced is to be included. 3 Starkie's Ev. 1613; 2d Saunders Pl. & Ev. 444, 445, (909, 911, margin,) Sudgen on vendors App. No. 8; 2 Taunt. 145; 2 Wm. Blackstone 1078; 6 Barnw. & C. 31; (13th E. C. L. R. 100;) 3 Wheaton 200; 2d Barnw. & C. 623; (9th E. C. L. R. 204;) 2 East. 211; 2 Wendall 399; 4 Rand. 346; 2 Ba. Ab. 266.

14. The instructions given by the court were not excepted to, and no advantage can now be taken of any misdirection, if it existed, unless it clearly appears that the verdict would have been otherwise, if there had been no such misdirection. Fleming v. Gilbert, 3 Johns. 528; Dole v. Lyon 10 Johns. R. 447; Goodrich v. Walker, 1 Johns. cases 250. De Payster v. The Columbia Ins. Co. 2 Caines R. 85.

15. It is the duty of every court, on motions for new trials, to take into consideration how far the error complained of, if any exists, was material, and grant and refuse the matter accordingly. Fleming v. Gilbert, 3 Johns. R. 528; Dole v. Lyon, 13 Johns. R. 447; Goodrich v. Walker, 1 Johns. C. 250; De Payster v. Columbia Ins. Co.; 2 Caines R. 85.; Hurst v. Burrell 5 Johns. R. 137.

16. From what has already been said the admission of the testimony of Mrs. Brown cannot be a cause for a new trial.

17. There was no misdirection of the jury by the judge. See authorities cited on 11th to 14th points. Nor was there any error in the refusal of instructions prayed for by the defendant. See the authorities on the 9th and 10th points.

18. The verdict is neither without evidence, nor against the weight of evidence on any issue, and even if the evidence were contradictory or doubtful, a new trial ought not to be granted. De Fouclear v. Shotterkirk; 3 Johns. R. 170.

19. The testimony of Mr. Risque neither found a tender,

or any thing which could avail the defendant. 1 Chitty 429. SEPT. TERM.
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20. The plaintiff having proved his deed, and the demand and refusal as alleged, and the defendant having failed to give any proof whatever of a tender, in either of the forms alleged in 3d, 4th, 5th, 6th pleas, all the bars set up by the defendant have been found against him upon clear evidence, and according to the weight of evidence, the plaintiff is entitled to recover, and the issues made on the first replication to the pleas of tender by the first and second rejoinders, are wholly immaterial.

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21. Both the issues made by the first and second rejoinders were well found for the plaintiff on sufficient evidence, and according to the weight of evidence; 3 Johns. R. 170.

22. The damages assessed are not excessive under the circumstances. Hopkins v. Lee, 6 Wheaton, 109. Shepherd v. Hampton, 3 Wheaton 200; Shepherd v. Johnson, 2 East. 211; Gainsford v. Carroll, 2 Barn. & C. 623, (9 E. C. L. R. 204;) Baldwin v. Meir, 2 Wendall R. 399; Baily v. Gray & al. 4 Rand. Va. R. 346; 2 Wendall 399; 4 Randolph 346; Floreau v. Thornhill 2 Wm. Bl. 1078; 13 E. C. L. R. 100; 3 Ba. Ab. 266 tit. damages; Hopkins v. Graefbrook 6 Barn. & C. 31, (13th E. C. L. R. 100;) 2 Sanders on Pl. & Ev. 444-5, (910-914.) Mercer v. Jones, 3 Campb. 447; 2 Saunders on Pl. & Ev. 419, (887.)

There is no error on the record, and the appellee is entitled to an affirmance of his judgment.

Opinion of the Court by Tompkins Judge.

George Hoyle brought his suit in the circuit court in St. Louis County against Robert Kyle, where he obtained a judgment, from which Kyle appeals to this court.

Hoyle in his declaration, which is in covenant, states that Kyle had sold to him certain real property in the town of Lynchburg, in the State of Virginia, which is described in his declaration; and covenanted, for himself and wife, to make a good "and valid title to the same, free from the claim of any person or persons whatsoever, to Mrs. Mary Brown, and to cause to be paid to her, all the rents arising from said property, from the date of the covenant declared on. The

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breach assigned is that Kyle had not conveyed the property, and had not caused the rents to be paid. Oyer of the instrument declared on was craved. In addition to what is stated (in the declaration,) of the contents of the covenant, we find, on oyer of the instrument, that Hoyle gave, as the price of such real property, two acceptances of N. and G. Dick and Co. of New Orleans, amounting to ten thousand eight hundred and seventy dollars, without endorsement by himself (Hoyle) or Mrs. Brown, and that Kyle took the same as five thousand dollars, and that Hoyle was also to give an order (*in the words of the instrument of writing*) on Natchez for four thousand dollars, payable out of a note due there the 21st, of July, then next, which said note was for the amount of ten thousand dollars, and that Kyle was to use his best efforts to further the collection of the said note, and after recovering the said sum of four thousand dollars, to pay or to cause to be paid over to the said Hoyle, or his order, the balance of six thousand dollars. The other covenants, contained in the said instrument of writing, are not material in the cause as presented by the evidence.

The defendant Kyle pleaded 1st. That the instrument of writing sued on was not his deed.

2nd. That the plaintiff had not before the commencement of the suit requested the defendant to make a deed.

3rd. That before the commencement of the suit he the defendant, tendered to Hoyle the plaintiff, a deed, according to the covenant, good and sufficient to convey the title in the property to Mrs. Brown &c.

4th. That there was no demand of the rents made by the plaintiff.

5th. That he did offer to deliver to the plaintiff, who was authorized to receive a deed &c. for the use of Mrs. Brown.

6th. That he tendered a deed to Mrs. Brown.

7th. That he tendered a deed to Hoyle, agent for Mrs. Brown.

Issues were made on the first and second pleas, and the plaintiff demurred to 3rd, 4th, 5th, 6th and 7th. These demurrers being over-ruled, the plaintiff replied to the third plea, 1st. that on the 10th day of May 1837, one Lorenzo

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Norvell sued out of the Circuit Superior court of law and chancery, a writ of subpœna and attachment, whereby Kyle and others were summoned to appear before the said court, to answer a bill exhibited against them by said Norvell, and unless they should appear and answer the said bill within four months thereafter the court, would take the same for confessed, and that on the said writ was an endorsement to the following effect. 'To restrain the defendants, David R. Edley. The Lynchburg Manufacturing company, Clay and Thornton, Frances S. Miller, Lydick and Yancy, and Benjamin F. Hunt who are resident defendants, from paying, carrying away, transferring stock, securing the debts by them or either of them owing to, or the effects in the hands of either or all of them, of the defendant Robert Kyle, who is absent from the country, until the further order of the Court.' The replication then avers that the said writ, with its endorsement, was duly served on the said defendants, except the said Robert Kyle, before the making of the deed in the declaration set forth, and that under the laws of the State of Virginia, the said writ endorsed as aforesaid, being served on the said defendants, the right and title of the said Robert Kyle in and to the real estate described in the deed, became and was liable for the debt due from said Kyle to said Norvell, and was a lien upon said real estate at the time of bringing this suit.

A second replication to the third plea denies the tender of the deed in the manner and form stated in the declaration, and it was agreed by counsel on each side that these replications should stand also as replications to the fifth, sixth, and seventh pleas: The fourth plea being passed over without any notice of it. To the first replications to the third, fifth, sixth and seventh pleas, the defendant rejoins, that the said debt was not a lien on the said real estate, and did not continue to be a lien thereon as in the said replications stated.

2nd. That there was no such record as stated in the replications.

3rd. That after the suing out of the said attachment, and the service, thereof on the defendants, to wit: on the tenth day of August in the year 1837, Norvell the plaintiff in said

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attachment, discharged the property in the deed in the declaration mentioned, from the lien of said debt, and that on the 4th day of December in the year 1837, said Norvell dismissed his said subpoena and attachment out of said court.

A demurrer was filed and sustained to the third rejoinder. Issues were joined on the two first rejoinders.

On the issues thus joined, the jury found,

1st. That the indenture in the declaration mentioned was the deed of the defendant Kyle.

2nd. And as to the second issue they found that the plaintiff did before the commencement of his suit request the defendant to make the deed for the real property in the declaration mentioned &c.

3rd. And as to the issues made on the first rejoinder to the first replication of the plaintiff to the third, fifth, sixth and seventh pleas. they find that the debt in the replications mentioned was and continued to be a lien on said real property from before the time of making the deed in the declaration set forth until after bringing this action &c.

4th. And as to the issues made on the second rejoinders to the first replication of the plaintiff to the third, fifth, sixth and seventh pleas of the defendant, it is found that there is such a record as is stated in that replication.

5th. And as to the issues made on the second replications to the third, fifth, sixth and seventh pleas it is found that the plaintiff before the commencement of his action did demand from the defendant a deed for said real estate.

6th. On the issue which they erroneously supposed to be made on the fourth plea, the jury find that the plaintiff did before the commencement of his suit demand the rents of the property contracted to be conveyed.

The plaintiffs damages were assessed to thirteen thousand and fourteen dollars, and judgment was entered up against the defendant accordingly. The defendant moved for a new trial for the reasons following:

1st. The verdict is against law and evidence.

2nd. It is against the weight of evidence.

3rd. That it is against the instructions of the court.

4th. That it is excessive in amount.

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5th. That the instructions given by the court to the jury are illegal.

6th. That the court refused to give the instructions asked by the defendant.

7th. That the court admitted improper testimony.

8th. That the witness Mary Brown was interested, and improperly admitted to testify.

The circuit court had instructed the jury,

1st. That if they believed there was a demand of a deed made according to the tenor of the covenant declared on, by the plaintiff of the defendant, and no refusal of a *definite* character made by the said defendant, they ought to find for the defendant.

2nd. But if the jury shall be of opinion that there was a demand of a deed made, and a refusal to give, before the commencement of this suit, on the terms of the covenant mentioned, they ought to find for the plaintiff.

3rd. If the jury shall be of opinion that the property in the deed described was incumbered by any legal or equitable title, or lien, at the time of the demand made by the plaintiff of a deed, or of a tender of a deed by the plaintiff, supposing such demand or tender to have been made, they must find for the plaintiff.

4th. The measure of damages in this case is the loss which shall appear to have resulted to the plaintiff by the breach of the covenant, including therein the consideration actually received by the defendant for his covenant.

The defendant then asked the court to give the jury the following instructions.

1st. That the proceedings in chancery offered in evidence constituted no lien on the property specified in the contract at the commencement of this suit—that the same was a lien only in case the personal property attached was insufficient, and there is no proof that it was insufficient.

2d. If the jury believe from the evidence that a demand was made by the plaintiff, and refused, and yet such demand and refusal was waived by the parties before the commencement of this suit, then such demand cannot be sufficient to sustain this action.

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The circuit court refused to give these instructions, and the defendant excepted to the refusal.

The covenant was given in evidence, and it is such as was set out in the declaration, and in the statement of this case.

John Stacker, a witness on the part of the plaintiff, stated, that on the 2nd day of June 1837, he sold to Kyle the defendant certain lots in the city of St. Louis, and received from him in pay for them, two acceptances or bills of exchange of N. and J. Dick & co. of New Orleans, that those bills of exchange became due on the 1st day of January 1838, that he had received one third when they became due, and that then the balance due was secured by new notes which bore an interest of ten per cent per year; that at the time of his giving this evidence, he had received another third part of the whole demand, that he had sold the property to Kyle at what he thought a fair price, viz: ninety-five dollars per foot; that Kyle told him he had given seventy-five cents in the dollar for them in property situated in Lynchburg Virginia; that he and Kyle were two or three weeks engaged in making this trade; that he frequently told Kyle that he believed that Dick & co. were able to pay all their debts; and that, although the money might not all be paid when it became due, yet he was confident that they would ultimately pay all their debts.

The testimony of Stacker is contained in two depositions; and when the first was taken, he appears to have resided in New Orleans; it appears also that he was consulted by Kyle as a person who had much information as to the ability of the house of the Dicks & co. to pay their debts.

Mary Brown, a witness on the part of the plaintiff, objected to by the defendant on account of interest, stated that she was not interested in the suit, or in the subject matter of it. She then executed and delivered an instrument in writing to Hoyle in which it is stated, that whereas the suit was founded on a written agreement made by Robert Kyle with George Hoyle, and that whereas the said agreement purports to be made by George Hoyle on her behalf, and that certain real estate was therein covenanted by said

Kyle to be conveyed to her for the purpose of paying and discharging certain debts due to her by said Hoyle, and whereas the said debts so due to her from said Hoyle, had since that time been fully paid to her, otherwise than by the conveyance of the said land, therefore she released all her right, title, interest, claim, or demand arising from the said agreement upon which the action was founded, unto the said George Hoyle, his heirs and assigns, and all the right in law or equity arising therefrom, &c.

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The witness then stated that Kyle had been acquainted with Hoyle and herself for a number of years at Lynchburg, but became more particularly intimate during the last eight months of their stay at that place; they all boarded at the same house, and were much in company with each other; the witness and Hoyle intended to go to Baltimore to live, but Kyle persuaded them to come to St. Louis; they all left Lynchburg together and came to Guyandot; the witness and Hoyle went thence to Natchez. While there, Hoyle received a letter from Kyle urging him to come to St. Louis, where they arrived on the 27th March 1837.—As soon as the boat landed, Kyle came on board; said he had been watching for them for two or three weeks, and expressed great pleasure at seeing them; Kyle conducted the witness to the house where he boarded, and not being able to procure a separate room for the witness, took lodgings himself in a room separate from his own family, and placed the witness in the room with them. On the 20th of May, Hoyle told the witness that Kyle wanted to trade with him for two acceptances he had on the Dicks of New Orleans, and had offered him Lynchburg property for them; Hoyle said if they traded he would have the deed made to the witness in order to secure her in the payment of part of the money she had loaned him; witness told him she did not want Kyle's property, and would not have it, and would tell him so the first opportunity she had. The next day they were both in the witness' room, and she repeated what she had said to Hoyle. Kyle appeared much disappointed, and said much about the value of the property in Lynchburg; that he had been offered ten thousand dollars for it, but considered it worth twelve; said he would be

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running a great risk in taking the Dick's paper; that he did not know that he should ever get any thing for it; represented their failure as one of the worst in the United States, amounting to fifteen millions, and that it was probable they would not pay ten cents in the dollar, but that he was personally acquainted with them; he thought if any thing could be got from them, he would have a better chance of getting than Hoyle. The witness still refused to take his property in Lynchburg, and heard no more of the trade until the first of June, when Hoyle told her that Kyle had made another proposition to him, that if he would let him have the acceptances of the Dick's he would go to Natchez, and use his best endeavors to collect a debt of two thousand dollars, that would be due in July; he remarked to the witness that he would not be able to go himself, and that from the present state of his health, he did not know that he ever should be. The witness thought if she persisted in refusing her consent she might be the means of making him lose the debt in Natchez; so they made the trade. The next day the witness went to Kyle's to board, which she had been asked to do by himself and his wife; the following morning Hoyle came there, and told her what a trick Kyle had played on him; that he had deceived him by making false statements; Kyle shortly after came in, and Hoyle accused him of acting unfairly, and treacherously towards him. Kyle denied he had done any thing amiss, and would not give the deed that day; the next day being Sunday, Hoyle did not speak to him.

On monday morning the witness asked him if he intended to give the deed that day, he said he did not know, he would see about it, but that he wanted to have some talk with Hoyle about their partnership. The witness said she did not know that had any thing to do with his giving the deed; he replied yes it had; that he wanted that matter settled first; Hoyle came soon after and asked him if he would give the deed; he said he would see about it, but he said what about our partnership; Hoyle said he would not be a partner of his if he would ensure him ten thousand dollars a year, and not require him to put in a dollar; then, said Kyle, I will give

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you no deed; Hoyle said, return me my acceptances then, Kyle said he had traded them for property, Hoyle said give me the property; Kyle refused to do so, but said, suppose we have another trade; what boot will you give me betwixt the Lynchburg property and this in St. Louis, Hoyle told him that he wanted to have nothing more to do with him, but if he persisted in refusing to give the deed, he would expose him by publishing the whole transaction; Hoyle and witness left Kyle's and went to Cap. Mason's where Hoyle was boarding; the next day they neither saw nor heard of Kyle; but on Wednesday the 7th of June, he came, and as he entered the room, observed. well I have got the deed now, I hope that will satisfy you; Hoyle said he would wish Mr. Risque to see it; Kyle said he might see it, witness asked him if she might look at it; he said yes, I hope you will be satisfied now; witness replied that she was far from being satisfied with his conduct, that he made her a very rude answer, and jerked the paper out of her hands and left the room; that afternoon Hoyle said he would go and try to get the deed; witness said, as she knew Kyle had threatened to take his life, she thought her presence might be some restraint on him, and determined to go also; they went accompanied by Capn. Mason, stopt at the gate of his tobacco factory, and sent in for him. As soon as he came out, Hoyle told him that he had come to ask him if he would give the deed; he said yes, if he would give the order on Natchez for four thousand dollars; Hoyle said here is the order, and took it out of his pocket; Kyle said his papers were not there, they were at his house; witness observed that she supposed they would go to his house; he said yes; and they all went, and were ushered into his parlor; Hoyle took a chair with his back against the wall, Mason on one side of him, and the witness on the other. Kyle soon came in with the deed, and seated himself immediately in front of Hoyle, their feet almost touching. Hoyle asked Mason to read the deed, and give his opinion of it; he said he believed it was a good deed according to the "uses" of Virginia. Kyle then said that Hoyle was to bear his expenses to Natchez, Hoyle said he was not; Kyle said he was a liar; Hoyle replied you are in your own house, and may

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make use of what language you think proper; Kyle shook his first in Hoyle's face, and asked him if he denied that he was to bear his expenses to Natchez. Hoyle said he did deny it, Kyle said he was a liar and a rascal, and made a blow at his face, which he dodged to avoid, and slipped off the chair; witness immediately got before him, that he might have time to recover himself; Kyle came behind witness, and tried to kick him, but not being able, he stepped back and got a chair, and was coming with it raised above his head to renew the attack, when Hoyle drew a pistol from his pocket, and presented it at him. As soon as Kyle saw it he dropt the chair and ran out of the room. Mrs. Kyle went up to Hoyle and begged him to spare her husband's life; he assured her he would for her sake. Kyle had left his papers scattered about the floor. Witness observed to Capn. Mason that he had better take charge of them; he said he would take all but the deed, and offered that to the witness; witness refused to take it, but he insisted on her doing so, saying there was no impropriety in it. Hoyle then gave him the order to present to Kyle, and they left the house; they had got a considerable distance when Kyle came running after them, calling to the witness to stop, that she had stolen his deed; they did stop; and he came up to witness, again accused her of stealing his deed, and took it from her by force, and the witness stated that she had never seen it since.

John F. Mason stated that some time in the early part of June 1837, he accompanied Mr. Hoyle and Mrs. Mary Brown, at the request of Mr. Hoyle, to the tobacco factory of Mr. Kyle in the city of St. Louis. Mr. Kyle met them at the gate that enclosed the factory. Mr. Hoyle stated to Mr. Kyle that he had called on him to know whether he would make him a deed to some property in Lynchburg Virginia. Mr. Kyle said he would make the deed provided, Mr. Hoyle would give him the order on Natchez for four thousand dollars. Mr. Hoyle took the order and presented it to Mr. Kyle saying here is the order. Mr. Kyle then said the deed was at his dwelling house. Mrs. Brown said, then we can go to the house and get it. Mr. Kyle then stated yes, and invi-

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ted them to the house, when they got to his house they were conducted into his parlor. Mr. Hoyle took a seat in a chair with his back to the wall, and his face to the west. Witness took a seat on his right hand, and Mrs. Brown on his left. Mr. Kyle took his seat immediately in front of Mr. Hoyle. Mrs. Kyle was seated immediately behind Mr. Kyle, rather to his left; Mr. Kyle presented to Mr. Hoyle a deed to the Lynchburg property; Mr. Hoyle handed the deed to the witness and asked him to read it; and pass his opinion on it; the witness did so, and said he thought it a good deed according to the forms and usages of Virginia. The witness handed the deed either to Mr. Hoyle or to Mr. Kyle, he does not recollect which, Mr. Kyle then said that if it was necessary for him to go to Natchez, Mr. Hoyle agreed to bear his expenses; to which Mr. Hoyle replied no sir, you are mistaken, I did not agree to bear your expenses. Mr. Kyle said it was a lie; Mr. Hoyle remarked, sir you are in your own house, and are at liberty to use what language you please. Mr. Kyle then said did or did you not agree to bear my expenses to Natchez? Mr. Hoyle replied, sir, I did not; upon which Mr. Kyle sprang from his chair, exclaiming at the same time, you are a liar, at the same time seizing Mr. Hoyle with his left hand, whether he struck or not witness does not know. If he did, witness neither saw it, nor heard it. Hoyle was in a falling position, at that time witness "slipped" between them, and with the assistance of Mrs. Brown separated them. Mr. Kyle stepped back to the extreme part of the room and picked up a chair, advanced to Mr. Hoyle with the chair raised. Mr. Hoyle then drew and presented a pistol at Kyle. Mr. Kyle then dropt the chair and ran out of the room. The papers, to wit: the deed, and orders, with other papers, were scattered on the floor, witness picked up the papers and advised Mr. Hoyle and Mrs. Brown to leave the house, and at the same time handed the deed to Mrs. Brown, and requested her to take it with her, which she refused to do, witness told her he considered there was no impropriety in her taking the deed. Mr. Hoyle then handed to the witness the order on Natchez, and requested him to give it to Mr. Kyle, and Mrs. Brown then took the deed. At

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which time they, Mr. Hoyle and Mrs. Brown, left the house Mr. Kyle came into the room after witness had sent for him; he asked where is my deed, witness told him that he had given it to Mrs. Brown. He said she has stolen my deed. Witness said no sir, she has not stolen your deed, I gave it to her, and I have the order on Natchez with a request from Mr. Hoyle to give it to you, and I will be responsible for the forthcoming of the deed if this matter is not settled. Mr. Kyle ran out of the house exclaiming she has stolen my deed. He hailed Mrs. Brown and Mr. Hoyle, and they stopt in the street; Mr. Kyle went up to them, and seized Mrs. Brown by the arm, jerked the deed away, saying you have stolen my deed, witness then remarked, sir, she has not stolen your deed; &c. I gave it to her, and I told you so at the house, witness then remarked to Kyle, that his conduct was exceedingly improper. Mr. Kyle then asked Mrs. Brown's pardon, and proposed that they should go back to the house. Mrs. Brown said that she could not go back after receiving such treatment as she had received there: witness then proposed that they should proceed down the street until they could get to some convenient place to exchange papers, witness and Mr. Kyle walked in advance of Mr. Hoyle and Mrs. Brown some fifteen or twenty steps. Mr. Kyle remarked to witness that he was wholly disqualified for business of any kind, and he did not consider himself in a situation to do business that evening. Witness then proposed to him that all the papers relative to the business be placed in his hands, and the parties meet at his house next morning at 8 o'clock, for the purpose of exchanging the papers. The proposition was made known to Mr. Hoyle and Mrs. Brown, and was assented to by all parties; the papers were placed in the witness's hands, and the parties met according to appointment. The witness then produced the papers i. e. the order and the deed; Kyle then refused to give the deed unless Hoyle would sign his name at the foot of a contract as agent of Mrs. Brown, witness bore the message to Hoyle who stated that he was willing to exchange the papers agreeably to contract, but was not willing to alter it, witness informed Kyle what Hoyle said, Kyle then said if Mrs. Brown would say at the foot of

the contract that George Hoyle was her agent, and sign her name to it, he would exchange the papers. Mrs. Brown refused to do it, and Kyle withdrew the deed, Hoyle left the order on Natchez in the witness's hands to be delivered to Kyle when he should deliver the deed. This order remained in the witness's hands twelve or fifteen days. At last Hoyle withdrew the order, and the witness believes that it was on the next day after that Kyle called on witness, and stated that he was then willing to exchange the papers as the contract stood. Witness told him he would see Hoyle when he came to dinner, and would let him know the result of the interview, that evening or in the morning. When Hoyle came in the witness informed him of Kyle's proposition. Hoyle requested witness to say to Kyle that he referred him to Mr. Risque, who had the papers. Witness told this to Kyle.

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Mr. Risque, a witness for the defendant, stated, that before this suit was brought, Kyle came to him, and showed him the said deed with the acknowledgment, and he, the witness, remarked to him that it needed authentication: Kyle then went away, and some days after returned with the deed authenticated. Witness refused to receive it, saying that the land was attached; he had not heard of this when Kyle came to him the first time; that the papers were put into his hands by Hoyle for the purpose of bringing suit, and that when the deed was shown to him the second time, he assigned no other reason for rejecting it than that the land was attached in Virginia; that the want of authentication referred to was that of the certificate of the county court.

Mr. McCausland, a witness for the plaintiff, stated, that early in the spring of 1837, he received a letter from the defendant Kyle, before he came to the country, engaging rooms for himself and Mrs. Brown, as Mrs. Brown and his wife could not live apart; he introduced Mrs. Brown at the witness's house when she arrived; Hoyle boarded at another place; he thought there was great friendship betwixt the plaintiff and defendant. The defendant one morning in the early part of May (as witness thinks) took him one side and told him that Hoyle had bills of the Dicks for more than ten thousand dollars, that he thought he could get them for five

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thousand, and that he had just seen Mr. Stacker, who told him the Dicks were good, and that he Stacker would give any real property he had for them. Witness answered that if Hoyle was such a fool as to take less than half for such paper as that it would be a good bargain. Kyle requested the witness to say nothing to Hoyle about it till he perfected the trade. Witness showed the property of Stacker to Kyle, says that he should not have assessed it at more than sixty or seventy dollars per foot. The distresses of the country were the subject of general conversation. Kyle seemed to take pains to introduce the subject at table at almost every meal, and always spoke of the Dicks disparagingly.

Several witnesses were examined on each side as to the value of the property purchased by Kyle from Stacker, with these bills of exchange, and also of the value of the paper of N. & J. Dick & co. at the time this contract was made by the plaintiff and defendant. The lots were valued variously at from fifty to one hundred dollars per foot, and the paper of Dick & co. was estimated at from fifty to seventy-five cents in the dollar.

A transcript of the record of the suit commenced in Virginia was given in evidence, and the statutes of Virginia under which the action was instituted.

The errors assigned are, 1st, That there was a judgment entered on the fourth plea when there was no replication to that plea.

2d. That a verdict was found negating the fourth plea when there was no replication to it.

3. That the court gave wrong instructions to the jury.

4. That the court refused to give the instructions asked by the defendant.

5. That the circuit court refused to set aside the verdict

Where the and grant a new trial.

Where the
issue tendered
by one of sev-
eral pleas was
immaterial, &
the demurrer
thereto improp-
erly overruled,
and no issue
was join-

On the first error assigned as well as on the second, it may be observed that had an issue been made on the matter in the fourth plea pleaded, it would have been wholly immaterial. It was the fault of the defendant that he pleaded that plea. It was his duty too, if any rent had been due, to pay it without demand, as he had covenanted to do so without

making it the duty of the plaintiff to demand. The words of the contract are "cause to be paid." He who contracts "to cause to be paid" contracts to pay, and if he pleads that *he did pay*, he may support that plea by evidences that he caused the money to be paid by his agent. The demurrer to that plea ought to have been sustained.

As to the third error assigned, it was correctly contended by the counsel for the appellee that in the first instruction the circuit court committed error against the appellee. The court told the jury if they should find a demand made by the plaintiff, and no refusal of a definite character made by the defendant, in such case they must find for the defendant. Let this be established for law, and a defendant, who has a mind sufficiently composed to restrain his tongue when the demand is made, or is artful enough to equivocate, will never subject himself to an action, if he be a dishonest man. It was therefore rightly contended for the appellee, that if Kyle had put his hands in his pockets, and held his peace when the demand was made, this would have been good evidence to authorize the jury to find a refusal to make the deed. The defendant, appellant, asked the court, by way of offset to this instruction, to tell the jury that if they believed from the evidence that a demand of a deed was made by the plaintiff and refused, and such demand and refusal was waived by the parties before the commencement of this suit, then such demand cannot be sufficient to sustain this action. The court refused to give this instruction. We are not told by the appellant's counsel that the word "waive" has any technical signification, or indeed any meaning ascertained by the decisions of courts of law. When a covenantor refuses to perform his covenant on demand, I understand that the other party may sue or not sue, as he pleases. If he does not sue he may be said to waive his right of action, but what right the other party, who had committed the breach of his contract, would have to waive the right of the injured party, I am at a loss to conceive. In an action of assumpsit, the books tell us, matters in discharge which admit a former cause of action, may be given in evidence under the general issue. See Chit. plead. p. 418. But the same

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ed on such plea, and the jury found for the plaintiff, the issue which they erroneously supposed to be joined on this plea, and the verdict was fully sustained by the finding of the other issues for the plaintiff, the Supreme court refused to reverse the judgment on account of the finding of the jury on such supposed issue. It was the fault of the defendant to tendersuch an issue, and it did not appear that he sustained any injury by such finding.

Where it is necessary to prove a demand and refusal, an instruction that the refusal must be of a definite character is erroneous, as it would be in the power of the defendant by evasive answers and equivocal conduct, to render it im-

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possible for
the plaintiff
to prove a de-
finite refusal.

author tells us at page 426 that matters in discharge of the action as a tender, set off, accord, and satisfaction before breach, former recovery, and release, must be pleaded in an action founded on a specialty; of this the counsel for the appellant appeared well enough apprised when the plea of tender was filed. But I suppose that they were not willing to stake their professional reputation on pleading as a discharge or release any matter that they may have here proved, and on the credit of which they claim this instruction about a waiver. This instruction then was in my opinion rightly refused. And Mr. Allen, one of the counsel for the appellee, rested the merits of the cause on the only point which admits of any room for argument, that is, whether the damages assessed, were such as to entitle the appellee to a new trial. I say this believing that the exception taken to the admission of the covenant declared on, in evidence on the allegation of a variance, and that to the competency of Mary Brown to testify, was taken pro forma only. I see no variance in the instrument produced and that as declared on, and the counsel has not attempted to show any, nor has he attempted to show why Mary Brown should not be held a competent witness.

It was proved abundantly that Kyle refused to make the deed according to the contract. Mrs. Brown states that on the 23d of June she went to Kyle's to board; on the next day Hoyle came there and told her what a trick Kyle had played on him, and that he had deceived him by false statements; that shortly after Kyle came in, and Hoyle charged him with acting unfairly and treacherously with him. Kyle denied doing any thing amiss, but would not give the deed that day. The next day being Sunday, Hoyle said nothing to Kyle. But on Monday morning the witness asked him if he intended to give the deed that day; he said he did not know, he would see about it, but that he wanted to have some talk with Hoyle about their partnership; the witness said she supposed that had nothing to do with the deed, and he replied yes it had, that he wanted that matter settled first; that Hoyle soon after came in, and asked him if he would give the deed; he said he would see about it, but, said he,

what about our partnership. And when Hoyle denied that he would enter into any partnership with Kyle, then Kyle said, I will give you no deed. Hoyle then demanded his acceptances. Kyle stated he had traded them off. Stacker, it will be recollected, stated that he had made the deeds for these lots, and received these bills of exchange on the 2nd day of June, three days before this scene.

The demand made of the deed on the 7th of June, two days after this last mentioned, is testified to both by Mr. Brown and Mr. Mason; On that occasion, he Kyle required Hoyle to bear his expenses to Natchez, in case it should be necessary to go; and when in the scene of confusion that ensued Mrs. Brown and Hoyle left the house, carrying off the deed by the advice of Mason, Hoyle leaving the order on Natchez in Mason's hands for him, he not only refused to receive it, but followed them into the street, and charged Mrs. Brown with stealing the deed, and forcibly took it from her. By one refusal to make and deliver the deed his covenant was broken, and the right of action against him accrued, and to this right there can be no bar, but accord and satisfaction, or a release, either of which must be pleaded as above stated. The offer on the 8th of June at the house of Mason to deliver the deed even if it had not been accompanied with the condition could not have been pleaded as a bar to the former breach. But accompanied with the condition it was not even a tender conformably to the contract; he made a tender to Mr. Risque, who testifies that he had orders to sue on the covenant and not to accept a deed. There was evidence enough to justify the jury in finding, 1st, that the covenant was the deed of Kyle. Secondly, that Hoyle demanded a deed and that Kyle refused to make and deliver it; and thirdly, that Kyle did not tender one. This being the case even if the jury had found that the issues made on the first and second rejoinders to the 1st replications to 3d, 5th, 6th, and 7th pleas in favor of Kyle the defendant, viz: If they had found that there was no such record, and that the debt was not a lien on the real estate, it would have availed him nothing: It is not material then to inquire whether the court instructed the jury rightly, or whether the

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A covenant to make and deliver a deed, on the demand of the covenantee, is broken by the first refusal to comply with the terms of the covenant in this respect and a right of action immediately accrues against such covenantor, and to this right there can be no bar but accord & satisfaction, or a release.

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jury found correctly under those instructions: It becomes necessary to inquire then whether the damages found are warranted by the evidence, and whether the rule for assessing damages prescribed by the circuit court was correct. The counsel on each side with great industry collected the law of the case. I shall not take the trouble to review any of their authorities, as the case appears to me a very plain one, and the rule which appears to me proper to be adopted here is agreed by both sides to be the correct one, viz: the consideration paid for that land, which Kyle covenanted to convey, and which the jury have found that he did not convey in accordance with his covenant. The consideration set out in the covenant is in these words, "and the said Kyle on his part has given as consideration for the aforesaid two acceptances of N. & J. Dick & co. of New Orleans, amounting to ten thousand eight hundred and seventy dollars without indorsement by Hoyle or Mrs. Brown, the receipt of which is hereby acknowledged, and which said Kyle takes as five thousand dollars, and likewise an order on Natchez for four thousand dollars, &c.

The plain common sense construction of this covenant is that Kyle agrees in consideration of these bills on N. and J. Dick and co., to make to Mrs. Brown a good and valid title, and to incur all the risk of the solvency of the acceptors.—He takes them at five thousand dollars because he covenants to make a good title free from the claim of all persons, and will be liable to refund that sum with interest if the vendee should be evicted by a better title, while he risks the solvency of the acceptors of the bill. He then is in the condition of a broker who agrees to buy these bills for five thousand dollars in cash, and having by artifice got the bills into his possession and sold them, suffers himself to be sued, and when judgment, after a delay of two years, is obtained, he contends that the amount of the bills and interest is not the true measure of damages, but five thousand dollars which he had undertaken to pay for them eight months before they became due, incurring also the risk of the solvency of the acceptors.

If Kyle had conveyed this property according to his con-

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tract; and Hoyle after such conveyance had discovered the advantage taken of his want of information, and then brought his action on the case for consequential damages, it appears to me that Kyle might have defended himself successfully against a recovery of damages by proving that the paper of the acceptors could not have been sold but at great discount, and that Hoyle might, by using due diligence, have acquired all the information necessary; perhaps a court of law would not even have required him to have proved any thing; but have required Hoyle to make out a case of fraud against him; Hoyle sold him the two bills of exchange, and an order on Natchez for a tract of land: he got into his hands the two bills and sold them, and refused to convey the land. The bargain is at an end. Hoyle must have back his notes; but Kyle has sold them to Stacker for St. Louis lots. Hoyle demands these, the lots, and Kyle in the language of a trader asks what *boot* he will give betwixt the Lynchburg property and these lots. If it had even been proved that nothing was collected on those bills, or could have been made on them, still Kyle ought to be answerable for the full amount; for he wrongfully converted them to his own use, and Hoyle himself might perhaps have made the money. But it was proved that one third was paid when they became due, and the other two thirds secured by new notes bearing an interest of ten per cent, and that before this judgment was obtained one half of the remainder was punctually paid, and no doubt was entertained of the punctual payment of the remainder. The notes of the most solvent men might be sold even by a prudent man at a great discount in consideration of receiving the money before the note became due. But if as before observed the purchaser were to get possession of such a note on the promise to pay down half its amount in cash, and then refuse to pay, every one sees that the measure of damages against him ought to be the amount of the note and interest. It is manifest from the face of this covenant that nine thousand dollars was intended to be the measure of damages Hoyle was to recover against Kyle in case the title to the real estate, contracted to be conveyed, should prove to be bad: and these two bills

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K. covenanted with H. to convey to him certain property for a certain consideration, and, in part payment of the consideration received from H. two acceptances of D's for \$10,870 00, without the endorsement of H. On account of the doubtful circumstances of D. these acceptances were taken as \$5,000 00. H. delivered the acceptances to K. who converted them to his own use, and refused to perform his covenant. In an action of covenant, the court held the measure of damages to be the full amount expressed on the face of the acceptances, & interest on the same at the rate of ten per centum from the time they became due. Napton Judge dissenting on this point.

were estimated at the sum of five thousand dollars in consideration that Kyle took them for the land without endorsement. But he wishes to keep the land, and compel Hoyle to sell them at less than half their amount, to be paid whenever Hoyle can compel him in a court of law to pay. No case cited by either party is similar to this. They were all cases of a money consideration, and not of a property consideration like this. And it appears to me that if it be decided that Kyle, who got possession of this paper on the pretence of conveying land which he afterwards refused to convey, shall now be adjudged to pay only five thousand dollars, the measure of damages he was to pay in case the title to the land proved to be bad, that we in effect decide that, where two persons enter into a covenant mutually promising to each other, if one prove faithless he may under the protection of the courts of law avail himself of his wit to appropriate to himself the profits of the speculation which the other had promised himself, and to which according to the terms of the contract, he was justly entitled. Kyle estimated his Lynchburg property to be worth \$12,000, Hoyle might have thought it worth much more. But Kyle agrees not only to reduce his price set on this property to \$9000, but also to take in payment two bills of exchange for \$10,870, eight months before they became due, and risk the solvency of the acceptors, &c. It would be an outrage on justice to say that Kyle should be allowed to hold his Lynchburg property which he had agreed to convey at a very reduced price, and still hold the bills at such an enormous discount. But we are to be told that the most experienced brokers say that at that time, this paper could not have been sold for cash but at an enormous discount: and both parties seem to have forgot that Kyle did not show any title to this paper either at its cash price or at any other price, having failed to perform his covenant, and is precisely in the situation as to the assessment of damages with a wrong doer.— But it is contended that the damages are excessive; and the jury having found an issue on the fourth plea for the plaintiff when no issue was joined on that plea, may have given damages for the non-payment of rents.

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In addition to what was said of the error of the defendant himself having pleaded that plea, it may now be added that no evidence was given of any rents being due. The covenant was entered into on 1st. June and the action commenced on the 22nd of that month; no rents of any account could have occurred in that time, and no evidence of their amount being given, it is not probable that the jury had any regard to them. It is conceived that the proper measure of damages in such a case as this is the highest interest, on the sum of money in litigation, which the law allows, that is to say, ten per cent. per year. The damages assessed are thirteen thousand and fourteen dollars; according to my calculation the interest on the amount of the bills from the first of January 1838, when they became due, till the fourth day of December 1839, at ten per cent. per year amounts to \$2096 35 which added to the principal gives an amount of \$12,966 30. The jury then found about \$47 65, more than under the circumstances of the case they ought to have done. The error was probably clerical merely. The plaintiffs will be allowed to remit that sum to wit: \$47 35 and on their doing so the judgment of the circuit court will be affirmed.

Napton Judge Dissenting.

I do not concur in this opinion. I have no objection to the measure of damages laid down in the instructions of the court; but the verdict of the jury is unsupported by the testimony taking the consideration money and interest as the proper test.

There was no proof to show that the acceptances of the Dicks were at par. The brokers in New Orleans estimated them at fifty per cent. below par; Hoyle himself placed that estimate on them, Stacker, who purchased them, did not give his opinion of their cash value, but considered them below par. If we take the value of the property he gave in exchange for them as a criterion, we find that the most favourable valuation upon that property was at twenty five dollars per foot. McCausland estimated it at sixty, and the assessors at forty five and fifty. Taking the highest estimate, the acceptances were sold at a discount of twenty

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per cent. Taking the mean estimate of the witnesses, they passed at thirty five per cent. below their nominal value, under the last estimate, the excess of the damages would be upwards of four thousand dollars; under the first, upwards of two thousand. The fraud spoken of in the books, as admissible to enhance the damages, I understand to be frauds in relation to the title, position or value of the property covenanted to be conveyed, as the failure to comply with the covenant is complained of, any fraud by which the loss sustained is proved to be beyond the value of the premises at the time of making the contract, very properly goes to the jury to enhance the damages. In such cases the jury may give the increased value of the property. The fraud attempted to be proved in this case was in relation to the value of certain negotiable paper in the hands of Hoyle. Had any such fraud been proved, it would in my opinion have been foreign to the case. I am also of opinion, that no fraud was proved. The jury found an issue which was not before them, namely, that the rents had not been paid. I do not undertake to say, that this error would require this court, on that ground only, to reverse the judgment, but because the damages are excessive and not justified by any testimony on the record (unless the jury thought themselves at liberty to give smart money for the supposed frauds of Kyle) the judgment should be reversed.

RUSSELL V. STEAM BOAT ELK.

1. In proceedings against a steam boat under the act concerning "boats and vessels," (R. C. 1835, p. 102) the fact that the boat was seized, under the provisions of said act, within the jurisdiction of this State, is prima-facia evidence that such boat was "used in navigating the waters of this State."
2. It is sufficient that it appear on the face of the complaint, that the action against such boat was commenced within six months after cause of action accrued, without a positive averment of that fact.

Error to the Circuit Court of St. Louis County.

Drake for plaintiff.

Plaintiff contends that the complaint is good, and that the demurrer to the pleas should have been sustained, and a re-

versal of the judgment of the circuit court is therefore sought here. The 4, section of the act of 1835 concerning boats and vessels, 6. Bac. abr. pleas and pleading, (B.) p. 186.

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Bowlin for Defendant.

Is the complaint good under the Statute? The complaint has been verified by affidavit such as it is, but the essential requisites of the statute, have not been sworn to by the affiant 3d Call Rep. 416. 1st. Wash 74. 2d, H. and M. 48 and 315. sec. 1. R. Code. page 102. sec. 4. 103, sec. 4. 103. sec. 21, 104. sec. 4, 103.

Opinion of the Court by Tompkins Judge.

Russel brought his action in the Circuit Court of St. Louis county against the Steam Boat Elk; and the judgment of the court being given against him he comes into this court to reverse that judgment.

The plaintiff in error proceeded against the Steam Boat Elk under the act of assembly. In his complaint, he states that he has a demand against the Steam Boat amounting to the sum of four hundred and twenty dollars, which arose as follows, on account of Henry Myers late master of said Steam boat; that on the fourth day of November 1837, the complainant went on board of said Steam boat in capacity of clerk, upon wages of forty-five dollars for the first month, and sixty dollars for every month thereafter, and continued on board of said boat, in that capacity, fourteen months, that is till the fourth day of February in the year 1839; that immediately thereafter the said Myers then master aforesaid, in his capacity of master of said boat, settled the complainants account with the said boat, when it was found that said boat was indebted to the complainant in the sum of four hundred and twenty dollars on account of his said services, for which sum the said Myers as master aforesaid, executed and delivered to the complainant, on the part of said Steam boat and Owners a note, of which the following is a copy; \$420. One day after date Steam boat Elk and Owners promise to pay to John Russell, or order four hundred and twenty dollars for services rendered on board of

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said board as clerk, Louisville March 3d, 1839. For Steamboat Elk and Owners, (signed,) Henry Myers; which said note, as well as the balance for which it was given remained wholly unpaid.

To this complaint the defendant pleaded several pleas, on which he did not rely, and the plaintiff demurred to them. The circuit court overruled the demurrer, deciding that the complaint was not good. The act provides that every boat or vessel used in navigating the waters of this State shall be liable for all debts contracted by the master, owner, agent or consignee thereof on account of work done, or services performed on board of such boat or vessel, see section 1st of the act to provide for the collection of demands against boats and vessels p. 102 of the digest of 1835, and by the 4, section of that act it is further provided, that the complaint shall set forth the plaintiff's demand in all its

In proceeding against a steam boat under the act concerning "boats and vessels," (R. C. 1835, p. 102) the fact that the boat was seized, under the provisions of said act, within the jurisdiction of this state, is prima facie evidence that such boat was used in navigating the waters of this State." 2. It is sufficient that it appear on the face of the complaint, that the action against such boat was commenced within six months after cause of ac-

particulars, and on whose account it accrued; that it shall be verified by the affidavit of the plaintiff or of some creditable person for him, and shall stand in lieu of a declaration.

The first objection taken to the complaint is that it does not show that the demand was against a boat used in navigating the waters of this State, but that it negatives that idea by setting up a demand created in Louisville Kentucky.

The second objection is that it does not appear that the cause of action accrued within six months before the commencement of the action. That the boat was found here to be served with the process issued by the circuit court of St. Louis county, is sufficient evidence on the part of the plaintiff to prove prima facie that it was used in navigating the waters of this State. But it is urged that the note sued on shows a demand created in Louisville Kentucky. If we admit that the note here sued on was made in Louisville Kentucky, (although there is no evidence of the fact,) that still is no evidence that the demand was created to use the language of the counsel in that State. The note expressly states that the consideration was services rendered on said boat. The complaint also states that the consideration was services rendered on board of said boat as clerk, during fourteen months. It can hardly be presumed that the boat lay

idle in the port of Louisville, in Kentucky, all that time, the complaint in that particular is in my opinion certain enough.

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The writ in this cause was issued on the 28th day of March 1839, and the complaint sets out an account for service commenced on the 4th of November 1837, and continued without interruption till the 4th of February 1839, less than two months before the commencement of the action; and the note made by the master of the boat for the owners, admits the correctness of the demand, within less than one month of the commencement of the action. The objections then to the complaint appear to me to be unfounded, and the judgment of the circuit court ought in my opinion to be reversed: and the other judges of this court being also of opinion that the judgment ought to be reversed; it is accordingly reversed and this court give judgment for the debt and damages.

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tion accrued
without a
positive aver-
ment of that
fact.

BYRNE V. STEAM BOAT ELK.

A note given on behalf of the owners of a steam boat, by their authorised agent, the clerk of the boat, for the amount of complainants demand, is evidence—in proceedings instituted against such boat to enforce the payment of such demand—of the justice as well as the amount of the claim.

Error to St. Louis circuit court.

Bird for Plaintiff.

1st. Plaintiff insists that demurrer admits every fact stated in the complaint which is sufficient to entitle the plaintiff to recover.

2nd. That any boat found in the waters of the State is liable to be sued for supplies furnished it for the last six months wherever the contract may have been made or the supplies furnished.

3rd. The complaint is drawn up as the law requires; no averment was required that the boat was used in navigating the waters of the State. No suit can be commenced unless the boat is found here, and the law never requires a useless averment.

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Bowlin for Defendant.

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The only point to be considered is, whether the complaint is good under the statute? The complaint has been verified by affidavit—such as it is. But no essential requisition of the statute has been sworn to by the affiant. 3d Call 416. 1 Wash. 74; 2d H. and M. 315, also 48; sec. 1 R. C. 102; 4 R. C. 103; 21 104; Sec 4 103.

Opinion of the Court by Tompkins Judge.

Byrne in his complaint states, that on the 23rd day of February in the year 1839, the steam boat Elk was indebted to him in the sum of \$213 20, on account of supplies furnished for the use of said boat, it being for debts contracted by the owners of said boat, and then &c., due and payable; and as an evidence of the indebtedness of the owners of the said boat to said Byrne, the owners of said boat by their authorised agent gave the said Byrne an instrument in writing, of which the following is a copy. "One day after date, St. Bt. Elk and owners promise to pay P. Byrne, two hundred and thirteen dollars and 20.100 for value received, Louisville, Feb. 23rd 1839, (signed) St. Bt. Elk and owners, by John Russell jr., clerk." The averment of non payment is then made, as well as the affidavit required by law.

A note given on behalf of the owners of a steam boat, by their authorised agent, the clerk of the boat, for the amount of the complainants demand, is evidence—in proceedings instituted against such boat to enforce the payment of such demand—of the justice as well as the amount of the claim.

The complaint was demurred to and demurrer sustained.—The demand appears to me to be very well set out. When we take into consideration that the clerk, as agent of the boat, by making the note of the owners to the complainant for the amount claimed, admits on their part as well the justice as the amount of the claim. The same objections are urged on the part of the owners against this complaint as against that of John Russell against the said boat; and for the same reasons as were given for the reversal of the judgment in that case, the judgment of the circuit court in this case ought to be reversed and such being the opinion of the other judges of this court it is accordingly reversed, and this court proceeding to give such judgment as the circuit court should have given, order that the plaintiff have judgment, &c.

THIRD JUDICIAL DISTRICT.

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SILVER V. STEAM BOAT ELK.

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Error to St. Louis Circuit Court.

Bird for Plaintiff.

Silver
v.

St. Boat Elk.

The plaintiff insists that the complaint is good, and that judgment should be reversed and judgment for plaintiff.

Bowlin for Defendant.

The only point to be considered is whether the complaint is good under the statute? The complaint has been verified by affidavit, such as it is. But no essential requisite of the statute has been sworn to by the affiant. 3 Call 416; 1 Wash. 74; 2d H. and M. 315, also 48; sec. 1 R. C. 102; sec. 4 R. C. 103; sec. 21, 104; sec. 4, 103.

Opinion of the Court by Tompkins Judge.

Francis Silver states in his complaint, that on the 23rd day of February in the year 1839, the owners of the steam boat Elk were justly indebted to him in the sum of four hundred and ninety-nine dollars and seventy-five cents, for services on board of said boat as carpenter, and then due and payable; and that as evidence of the debt, so due from said owners, and of the contract made between the said owners, and the said Silver. John Russell junior, then acting and authorised to act as clerk of the said steam boat, made and delivered to the said Silver an instrument of writing of which the following is a copy, viz: "One day after date steam boat Elk and owners promise to pay to Francis Silver four hundred and ninety-nine 75.100 dollars, balance due on settlement for services rendered on board as carpenter. St. Bt. Elk and owners by John Russell jr., clerk, Louisville, Feb'y 23d, 1839." The complaint was demurred to and the demurrer sustained. The judgment of the circuit court in this case will also be reversed and the cause remanded to the circuit court for the same reasons as are given in the case of Peyton Byrne vs. the Steam Boat Elk, decided at this term.

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ST. BOAT GEN'L. BRADY and G. COLLIER owner, appellants
v. BUCKLEY and RANDOLPH.

Steam Boat
Gen'l Brady.
v.
Buckley and
Randolph.

1. Merchandise furnished the master of a steam boat, for the purpose of enabling him, therewith, to purchase wood and other necessaries for the boat in the prosecution of her trip, becomes a "debt contracted by the master, on account of supplies furnished for the use of such boat," within the meaning of the 1st sec. of the act concerning "boats and vessels."
2. The lien on boats and vessels, arising under the provisions of the act of Feb. 12, 1839, (Laws of Mo. session 1838-9, p. 13,) is divested by proceedings and sale under the act of March 19, 1835, at the suit of any person holding a lien, without regard to the date of such lien, and the purchaser at such sale, will hold the boat discharged of all liens.

Appeal from the circuit court of St. Louis county.

Spalding and Tiffany for Appellants.

1st. That the cause of action sued on by the appellees, was not a lien upon the boat under the statute, acts of assembly of 1838-9 p. 12; Abbot on shipping 104, 107; 3 Kent's Com. 132-3.

2nd. That if it was a lien, yet the lien was divested by the proceedings and sale upon the justice's judgment, 2, bac. abr. 721. 4, east 345.

Hamilton for Appellees..

But two questions arise here: Is this a lien within the act? If it be, did George Collier purchase subject to it? R. Laws p. 102. Act of February 12, 1839. 5th vol. Mo. Reports, 256. 3 Kent 163, 157, 96, 170. 6 Mass. 426. 7 Cowen 670. 4 T. R. 411. 4 Cowen 469.

Opinion of the Court by Tompkins Judge.

McGirk, Judge, not sitting.

Buckley and Randolph brought their action in the circuit court of St. Louis county against the steam boat Gen. Brady, and there had judgment. From that judgment the boat appeals.

The bill of exceptions shows this agreed case: that on the 3d day of July, 1837, Buckley and Randolph duly caused the said steam boat to be seized and levied on, so far as that could be done under the state of the case, under the act of 9th March, 1835, and the act of 12th February, 1839, supplementary thereto. Said boat then being in the hands of the constable, upon the demand in the complaint of Buckley

and Randolph specified; that this demand accrued within six months next preceeding the commencement of this action, to wit, on the 15th day of May, 1839, under these circumstances: On the said 15th day of May the said boat, being then about to depart on her voyage up the Missouri river, from St. Louis as far as Independence, the master of the said boat applied to the plaintiffs (with whom he had previous dealings of the same kind, the plaintiffs then being and for some time previous having been the agents of said boat) for about, as he said, the sum of two hundred and fifty dollars, to enable him to pay his expenses for wood and stores on the voyage; that the plaintiffs stated they had no money to advance to the boat at that time. The master then asked the plaintiffs to procure him salt, which it was thought would the more readily enable him to raise the funds necessary for the purpose stated. To this proposition the plaintiffs not assenting, the master said he would take coffee to dispose of on the voyage. The plaintiffs then delivered him fifteen sacks of coffee, out of which he was to bear his expenses, and restore the remainder on his return. On his return he delivered to the plaintiffs eight sacks, having disposed of seven; that as agents, the plaintiffs had frequently loaned or advanced money to the boat, and sometimes as much as five hundred dollars for expenses; that at the time the said debt was contracted, it was customary at this place, for agents of boats to advance money for such purposes, when the boats were about to depart on their voyage; and that the sum advanced by the plaintiffs for the Brady was moderate; that the said boat was then owned in part in St. Louis, and that the master was a part owner. It was also agreed that on the day the boat was levied on by the sheriff as aforesaid, she was in the hands of the constable, and remained in his possession when she was released, bond and security being given in conformity to the statute, by George Collier (who now defends this suit) and William G. Pettus. It was also agreed, that before the boat was levied on as aforesaid, by the sheriff, to wit, on the second day of July, in the year 1839, under and by virtue of sundry warrants issued by several justices of the peace of the township and county of

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St. Louis, at the suits of different plaintiffs, for sums within their respective jurisdictions; and for causes which were respectively liens upon the boat under the said statutes; (and some of which causes of action were for wages of hands and crew then just accrued,) all which warrants were directed and delivered to the constables of St. Louis township on the second day of July aforesaid, and that they on that day levied upon and seized according to law the said boat, and took and retained her in custody so far as they could, until they sold it; and that on the said 2nd day of July judgments were rendered against said boat in all the causes commenced as aforesaid on that day; and executions, called orders of sale, were duly issued to the constables thereon; upon which the constables sold the said boat on the 15th day of July, and George Collier became the purchaser, and the boat was delivered to him. But the sheriff insisting on his levy, Collier gave his bond in the suit. The constables gave Collier a deed conveying to him the boat. The appellant, moved to set aside the verdict and for a new trial, the motion being overruled the appeal was taken.

The act of 19th March, 1835, provides that every boat or vessel used in navigating the waters of this State, shall be liable 1st, for all debts contracted by the master, owner, agent, or consignee thereof, on account of supplies furnished for the use of such boat or vessel, &c., see section 1st. And the act of 12th February, 1839, declares that there shall be a lien on every boat or vessel, used in navigating the waters of this State, for all debts contracted by the master, owner, agent, or consignee thereof, on account of stores and supplies furnished for the use thereof.

Two points are to be decided to ascertain the merits of this cause;

1st, Was the money claimed as the price of the coffee, a debt within the provisions of these two acts?

2d, Does the priority of the levy, or the priority of time at which the demand accrued, entitle the claimants to a preference in having their claim satisfied?

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1st. Boats cannot be expected to take with them all the stores and supplies necessary for so long a voyage as that

for which this boat appears to have been making provision, when the coffee was advanced. If the appellees had furnished the master money to purchase stores or supplies for the use of the boat, this could not, under a strict construction of the acts, have been called stores and supplies, or either of them; and yet the money to purchase these stores and supplies is as necessary for the success of the voyage as the labor of the men employed in navigating the boat. The boat could not reasonably expect a credit at every wood yard, and at every farm on the river where it might be necessary to purchase supplies for the comfort and accommodation not only the boats crew, but also of the numerous passengers frequently found on board of these boats. A liberal construction of the law, then, is necessary for the advancement of the remedy which the legislature seemed to contemplate in enacting these laws, I am then inclined to think that, under this provision of the law, ought to be included not only money to purchase stores and supplies for the use of the boat; but also this coffee furnished by the appellees at the request of the master. Owners ought to employ none to navigate their boats but such as deserve their confidence; so far as trusted to make contracts necessary to expedite and accomplish the voyage, it is better for them to risk the integrity of the master than that their boats should be delayed for want of the means of purchasing stores and supplies.

2nd. It is admitted on the record, that the demand of the plaintiffs accrued on the 15th day of May, 1839, and in point of time is prior to those under which the constables' sales were made. Collier, who defends here as owner of the boat, claims under a deed made to him by the constable, as purchaser at his sale. If it be decided that the sale under the constables' warrants is made subject to the plaintiff's demand, because that demand accrued first, then the consequence will be that no man will ever be safe in selling a boat for such a demand, unless he wait till the last moment of the six months limited by the statute, within which his action must be commenced. The only safe standard of the value of an article is the price it will bring at a fair sale. It is in

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the meaning
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The lien on
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evidence that this boat was offered for sale in conformity with the provisions of the 16th section of the act of 19th March, 1835, above mentioned, and that nobody would agree to pay the amount of the several warrants in the hands of the constable for less than the whole interest in the boat. No man would bid for a boat offered for sale as this was, if he were apprised that after buying once under a sale for the benefit of creditors, whose demands had accrued within a few days before the commencement of the suit, he would be still liable either to lose his boat, or to pay all the debts which that boat might have incurred within the six months next preceding the commencement of the suit under which he claims title. But the policy of the law is to favor the diligent. The suitors before the justice were most diligent; they commenced their action on the second of July; the plaintiffs did not commence their action till the following day, viz: the third. Had the suitors before the justice waited five months, the appellees might have waited a day longer, and the consequence might have been the same; indeed, the suitors before the justice might not have known of the existence of the appellees' demand, and if they did, they certainly did not and could not know that the appellees ever would sue.

To construe this law in any other way than to give the preference to those who first commenced their suit, would be to render the law a nullity. It would be worse than nothing. It would give the owners an opportunity of collusion with those who held the elder demands, to deter those whose demands were of later date from suing. Laws ought to be so construed as to advance the remedy instead of construing them so as to defeat it. To suppose that the legislature intended to compel by this indirect method each person having a claim on a boat to wait till all those who had claims of an older date should sue, is to suppose, as it seems to me, a strange thing, an impossibility, unless the same law had made it the duty of these older claimants, under pain of forfeiture, to register their claims with some officer. Such an absurdity cannot be supposed. The law was intended then to subject this boat to be sold for the benefit of the

most diligent. The boat was sold for the benefit of the most diligent; that is to say, for the claimants whose warrants were issued on the 2nd day of July. The circuit court then in my opinion committed no error in deciding that the coffee furnished by Buckley and Randolph raised a debt against the boat within the provisions of the statute. But in my opinion that court did commit error in deciding that the boat was sold on the 2nd day of July by the constable subject to the lien of the plaintiffs appellees in this action, and its judgment is therefore reversed.

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MULLANPHY, plaintiff in error, v. St. Louis County Court
defendant in error.

1. A peremptory mandamus cannot issue on the return of a rule to show cause why a mandamus should not issue, &c. A mandamus must have first issued before a peremptory mandamus can be granted.
2. The county court has no right to grant letters of administration to a stranger, before an opportunity is afforded, within the time prescribed by the statute, to those entitled to administer, to take out letters: and where the court had thus, improvidently, granted such letters to a stranger, the letters were properly revoked on the application of those entitled to administer.
3. An appeal lies from the decision of the county court revoking letters of administration; such appeal, however does not operate as a supersedeas. The provision of the statute, concerning the supersedeas, only applies to those cases in which the appellant is adjudged to pay a debt.

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Error to St. Louis Circuit Court.

B. Mullanphy in propria personæ.

1st. That the said circuit court gave judgment below in favor of defendant in error, and against plaintiff in error, whereas, by law, the said circuit court ought to have given judgment below in favor of plaintiff in error, and against defendant in error.

2d. That the said circuit court overruled plaintiff in error's motion for a mandamus to issue to defendant in error commanding them to grant plaintiff in error an appeal; whereas, by the law of the land, such motion ought to have been sustained by the said circuit court.

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county.

3d. That the said circuit court discharged the rule to shew cause made by it on defendant in error; whereas, by law, such rule ought not to have been discharged by the said circuit court.

4th. That the said circuit court gave judgment against plaintiff in error for costs; whereas, by the law of the land, such judgment for costs against the plaintiff in error ought not to have been given.

Geyer for Defendant.

1. The order granting letters to a stranger within three days of the death of the intestate, was improvident, irregular and illegal.

2. It was not only competent for the court, but it was its imperative duty to rescind such order, application for that purpose being made within the term.

3. That the revocation of the letters followed as the necessary consequence of the setting aside the grant.

4. Though the statute provides that an appeal shall be allowed on orders revoking letters; it is confined to orders made in the cases provided for by the statute of which this is not one.

5. The plaintiff did not bring himself within the provisions of the statute, by filing a bond with security, approved by the court; as is required.

6. It no where appears that the bond was approved, or was such as ought to have been approved.

7. The county court did not approve or disapprove the bond, and until then an appeal could not be allowed.

8. The case made by the plaintiff did not authorise the suing out a mandamus.

Opinion of the Court by Tompkins Judge.

McGirk Judge not sitting.

The county court of St. Louis county on the 10th day of June, in the year 1840, granted to Mullanphy letters of administration on the estate of Andrew J. Davis, and on the next day, to wit: on the 11th day of June, the court revoked those letters. Mullanphy prayed an appeal which the coun-

ty court refused to allow, Mullanphy filed in the circuit court of St. Louis county a petition for a rule on the county court, to shew cause why a mandamus should not issue from the circuit court, commanding the county court to grant him an appeal from the decision and order of that court revoking his letters of administration on the estate of Andrew J. Davis, granted as aforesaid. The rule was granted, and the return made thereto by the county court was that on the tenth day of June one thousand eight hundred and forty, on the second or third day after the death of Andrew J. Davis, the said Mullanphy applied to the court for letters of administration on his estate, which were granted to him on condition that said letters should be revoked, if any person better entitled to administration should apply for them, and that Mullanphy assented to this condition; that the court would not otherwise have granted them; that on the next day the brother and cousin of the deceased applied to the court for letters, and that the court conceiving the brother to be entitled by law to the letters of administration, rescinded the order granting letters to Mullanphy as aforesaid, revoked his letters, and granted administration to Phineas Davis, the brother, and John Davis, the cousin of the said deceased. It appeared also that Mullanphy when he applied for an appeal from the decision of the county court tendered a bond to prosecute his appeal &c. and that this bond was not objected to.

On this return being made by the county court, Mullanphy moved the circuit court for a mandamus to the county court commanding that court to grant him an appeal. The circuit court overruled the motion and entered up Judgment against Mullanphy. The act of 22 December 1836, provides that a mandamus shall go to the county court from the circuit court in the first instance and on the return of this writ, it shall be lawful for the person suing or prosecuting such writ to plead to &c. and on obtaining a judgment a peremptory mandamus shall go &c. A mandamus is a writ of the State which should run in the name of the State, see 19th section of the 5th article of the constitution. The county court then being brought in by mere rule of court;

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A peremptory mandamus cannot issue on the return of a rule to show cause why a mandamus should not issue, &c. A mandamus must have first issued before a peremptory mandamus can be granted.

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and on the answer given a peremptory mandamus being asked of the circuit court, the whole proceeding is void, I will however review the law arising in the case as if the proceedings were regular.

By the 8th section of the 1st, article of the act respecting executors and administrators, it is provided, that letters of administration shall be granted first to the husband or wife, or to those who are entitled to the distribution of the estate, or to one or more of them, as the court or clerk in vacation shall believe will best manage or improve the estate, section 6th. If no such person apply for such letters within sixty days after the death of the deceased; letters may be granted to any person whom the court or clerk in vacation may consider most suitable, 7th, section. The county court or clerk in vacation, on the application of any person interested, may issue a citation to the persons entitled to administration, calling on them to administer, and if they fail to take letters within thirty days after the service of the citation, or if the persons entitled to preference, file their renunciation thereof in the county court, letters of administration shall be granted to the person next entitled thereto, see pages 41-2 of digest of 1835.

The county court has no right to grant letters of administration to a stranger, before an opportunity is afforded, within the time prescribed by the statute, to those entitled to administer, to take out letters: and where the court had thus, improvidently, granted such letters to a stranger, the letters were properly revoked on the application of those entitled to administer

It was a most unwarrantable act in the county court to grant letters of administration to a stranger, as Mullanphy appears on this record, before the lapse of sixty days from the death of the intestate, or before the other requisitions of the statute above stated had been complied with. But he contends that non constat but the requisitions of the statute have been complied with, or that he is entitled to distribution, and that the county court having once granted him letters of administration must be supposed to have done their duty and to have taken care that the requisition of the statute had been complied with, that is to say, it is to be presumed that the county court ascertained before the grant either that those entitled to distribution had filed their renunciation in writing, or that Mullanphy was one of those so entitled. To this it may be answered that as the grant was made within sixty days, the reasons why it was made to him ought to be shown, in order to entitle him to any fa-

vourable decision of the appellate court on the question of merits. But admit it for a moment that the first grant by the county court raised a presumption that the previous requisitions of the statute had been complied with, the revocation raised an equal presumption that those requisitions had not been complied with. In either point of view then the applicant is left to prosecute his naked appeal with a certainty of defeat, in case the requisitions of the statute had not been complied with. It was insisted with great zeal on the part of the county court that an appeal would not lie in such a case; that if an appeal would lie, such appeal would, on filing of bond according to law become a supersedeas, and the consequence would be that the most obnoxious characters might, by the delays frequently occurring betwixt the county court and the court of last resort, hold on to the administration till he had time to waste the estate. It is very true this might be the case, and the county court might not always be able to ascertain to a certainty that the security were and would remain solvent. But the language of the statute appears to me to be very plain and comprehensive. In the 1st section of the 8th article of the act p. 63, of the digest, it is said that appeals shall be allowed from the decision of the county court to the circuit court, on orders revoking letters testamentary or of administration. An appeal then in my opinion lies, and if a party be so determined he may appeal although there be a certainty of ultimate defeat. But I do not believe that the appeal bond when approved and filed entitles the appellant to have the new grant of administration superseded. The fourth section of the article last above cited provides that "every such appellant shall file in the court the bond of himself or of some other person, in a sum with security approved by the court conditioned that he will prosecute the appeal and pay all the debt damages and cost that may be adjudged against him. The fifth section provides that "after the affidavit and bond have been filed, the appeal shall be granted, but shall not be a supersedeas, to any other thing relating to the administration of the estate, except that from which the appeal is specially taken: I construe the provision concerning the

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An appeal lies from the decision of the county court revoking letters of administration; such appeal, however, does not operate as a supersedeas. The provision of the statute, concerning the supersedeas, only applies to those cases in which the appellant is adjudged to pay a debt.

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supersedes to extend only to the subject matter of the fourth section, which, in my opinion, is where the appellant is adjudged to pay a debt.

I am of opinion then that the county court ought to have granted the appeal. But that the circuit court committed no error in refusing the peremptory mandamus, there being no previous return to a conditional mandamus.

For the reasons above given the judgment of the circuit court ought to be affirmed, and the other members of this court also being of that opinion it is accordingly affirmed.

RIGGIN Plaintiff in Error v. COLLIER & PETTUS Defendants
in Error.

1. It is not necessary for the Supreme court to determine the proper manner in which the circuit court should allow amendments to be made;
2. Our statute in relation to damages on bills of exchange is not limited to the holders of the bills at the time they become due.
3. The courts will not take cognizance judicially, that "New Orleans" is in the State of Louisiana. There must be an averment to that effect in the declaration.

Mullanphy for Plaintiff in Error.

Plaintiff in error avers that the circuit court erred below in this cause, as will appear from the record, by giving plaintiff in error judgment v. defendant in error, whereas by law said circuit court ought to have given judgment for plaintiff in error and against defendants in error.

Circuit Court erred in allowing defendants in error to amend.

Circuit Court erred in overruling plaintiff in errors demurrer.

Circuit Court erred in overruling plaintiff in errors motion for a new trial.

Circuit court erred in overruling plaintiff in errors motion in arrest of Judgment.

Spalding for defendant in error.

1st. That the amendment was rightfully permitted by the court Revised Code 467, 4 Mis. Rep. 426. But that, at any

rate, no amendment was necessary, because the declaration was originally right, and if not the error was no variance, the initial of the middle name being no part of the name.

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2nd. There is no error on the record to arrest the judgment.

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3rd. That the court did right in refusing the instructions because 1, the owner of a bill has the right to fill up the blank endorsements to himself. *Hunter v. Hempstead* 1. Mo. Rep. 68, *Wiggins v. Rectors* Ext. 1; Mo. Rep. 478, 11, *Peters Rep.* 80, 2, and a subsequent endorsement in full does not prevent it. *Chitty on bills* 256, 18 *John Rep.* 230. 3. Nor is it necessary, in order to recover, that he should strike out the subsequent endorsement in full, though in this case it had been sticken out, 3 *Wheat Rep.* 172, (4 *Cond. Rep.* 223) 1 *Summers Rep.* 478, *Picquet v. Curtis*.

Mullanphy in Reply.

The first of the objection to the amendment is the manner of its introduction, not that there would have been equal ground of exception, had a new count been filed. The bill of exception is the only and proper mode of preserving the real state of the record, Supreme court will not interfere on mandamus to prevent violation of the record, *Dixon v. Judge*, 2 judicial district 284, 4th vol, mo. Rep. Again there was in fact no amendment, an amendment is the supplying or correcting a defect. The count was a perfectly good count. It wanted no correction. There was no defect to supply. The act was an alteration of the demand, a motion by plaintiff to strike out oyer and enter up judgment was undisposed of on the record. It was not withdrawn rules of court sec. 9. Judgment on verdict could not be entered up without error whilst a motion made before verdict to enter up judgment peremptorily was pending and undetermined. Therefore judgment thus improperly entered up ought to have been arrested on defendants motion to that effect. It is conceived that this point is error patent upon the record, and no motion in arrest was necessary sec. 22 moore 215 *Selwyns nisi prius* 955, The then holder of the bill could then by assignment of the bill convey his interest

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in it. But he could not convey a right of action for statutory damages, so as to enable an assignee after presentment protest, and dishonor, to recover same in his own name, bonds and notes statutes of Mo. sec. 2, 105, P. and previous to the holders having a claim for damages, it must be proved that they purchased for a valuable consideration 98, 99. Statutes of Missouri. Bills could not be duly presented except by holder or his agent, Chitty on Bills 259. Walker v. Barnes 1. Worch 36 Chitty 221 note b. The right to damages must accrue upon presentment and dishonor or never. There was no proof that New Orleans was out of the State of Missouri, that was essential to damages, 240 last paragraph of note 9. Johnson 121, damages Sproule v. Sproule, 1; Barn and Cress. 16. Bill payable at Dublin without Stating Dublin in Ireland will be presumed payable in England, Chittys bills 5, 82, Letree v. Don. 9, Wheat 558. B. U. S. v. Smith 11 Wheat 171.

Opinion of the Court by Napton Judge.

McGirk Judge not sitting.

Collier and Pettus brought suit against Riggin in the circuit court of St. Louis, upon a bill of exchange, drawn by John D. James upon John E. James at New Orleans, for six thousand dollars, in favor of Thomas J. Payne, who endorsed to John Riggin, who endorsed to plaintiffs below. The declaration contained a count upon the bill, describing it as payable at New Orleans, and protested &c. for non payment, the common counts were also added.

Oyer was craved of the bill, and a special demurrer to the first count, and non assumpsit pleaded to the other counts. The plaintiffs then asked leave to amend, by changing the name of Thomas D. Payne to Thomas J. Payne, which was granted. The defendant took a bill of exceptions to the action of the court in granting leave to amend, and the cause was continued until the next term, defendant having withdrawn his Oyer and demurrer, and pleaded the general issue to the first count. At the next term, the cause was tried and a verdict given for plaintiff for seven thousand seven hundred and ten dollars sixteen cents; and judgment

entered according. The defendant moved for a new trial, on the ground that the verdict was against law and evidence, and moved in arrest of judgment: 1st, because the declaration was not such an one as judgment could be rendered upon in this cause.

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2d. Because the whole proceedings are irregular, erroneous and informal.

3d. Because the writ, declaration, amendments, and judgment are irregular, erroneous and informal. Both motions were overruled, exceptions were taken, and the case is brought here by appeal.

From the bill of exceptions it appears, that the bill was given in evidence, with the necessary proof of partnership endorsement, dishonor, and protest, and notice. Below the endorsement was an endorsement in full which had been erased. It was in these words, "Pay Edw. Duplessis esqr. cash. or order, W. C. Anderson agent." It was proved, that said bill was at its date sold to the Commercial Bank of Cincinnati, the endorsements of Payne and the defendant being in Bank; that William C. Anderson, the agent of said Bank, endorsed it to Duplessis, who was cashier of a bank at New Orleans, solely for collection, and sent it down to him for that purpose; that when it was dishonored, it was sent back to Anderson by Duplessis, and the Commercial Bank afterwards sold and delivered it to plaintiffs. The endorsement in full to Duplessis was stricken out, and the endorsements to Payne & Riggin were filled up afterwards. It was proved that the plaintiffs had no interest in the bill until it was sold to them as above stated.

Instructions were asked by the defendant, calling upon the court to declare that no recovery could be had, if the endorsement by Anderson to Duplessis was an endorsement in full, while the other endorsements were in blank, which instructions the court refused to give.

The points deemed material, are

- 1, The amendment;
- 2, The instructions; and
- 3, The damages given.

1. The power of amending is expressly given by the

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Statute, (Rev. Co. 35 p. 467;) and the only objection to the exercise of the power in this case, seems to be the manner in which the amendment was made. The declaration as amended only appears on the record before this court, the amendment having been made by an alteration of one letter into another. The bill of exceptions does not in terms state, that the amendment was made, but it recites that a motion to amend was made and granted, and the declaration on the record appearing to correspond with the suggested amendment, it may be fairly and reasonably inferred, that it was made.

It is not necessary for the Supreme court to determine the proper manner in which the circuit court should allow amendments to be made.

It is not necessary for this court to determine the proper manner in which the circuit court should allow amendments to be made. It may well be questioned whether this court has any control over the records of a circuit court. The party complaining in this case, has, however, by his bill of exceptions, attained every thing which would have appeared had a new count been filed. There is no doubt the amendment was proper, and the defendant had a continuance, and pleaded to the amended declaration. He seems to have suffered no inconvenience by the course pursued in the circuit court.

2. As the second point was not insisted on in this court, I will only observe, that the authorities cited at the bar fully sustain the instructions of the court. *Hunter vs. Hempstead* 1 Mo. R. 68; *Wiggins vs. Rector* 1 J. C. 474; 11 *Peters* R. 80.

Our statute in relation to damages on bills of exchange is not limited to the holders of the bills at the time they become due.

3. It is contended that our statute in relation to the damages recoverable on bills of exchange, is limited to the holders of bills at the time they become due: there is nothing in the terms of the act to justify such a construction. The expressions in the act are unqualified, and we are not at liberty to resort to construction to ascertain the meaning of an act which is plain and unequivocal.

The courts will not take cognizance judicially that "New

But the jury in this case gave ten per cent. damages, as though the bill was payable at New Orleans in the State of Louisiana. There was no averment in the declaration that New Orleans was not within this State, and the courts of this State cannot take judicial cognizance of places without its

limits. Had there been such an averment in the declaration, the jury would have required, I suppose, but slight testimony to lead them to the conclusion that the New Orleans mentioned in the bill was in the State of Louisiana. In *Kearney vs. King*, (2 Barn. & Ald. 302,) the court of Kings Bench declared that they would not take cognizance, judicially, that Dublin was in Ireland, though this case occurred subsequent to the Union; and because the declaration did not describe the bill as drawn at Dublin in Ireland, they would not allow a bill appearing to be drawn at Dublin in Ireland to go in testimony.

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Orleans" is in
the State of
Louisiana.
There must
be an aver-
ment to that
effect in the
declaration

For this last reason, the judgment must be reversed, unless the plaintiffs will remit six per cent of the damages—in which event the clerk will enter an affirmance of the judgment.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

FOURTH JUDICIAL DISTRICT.

SEPTEMBER TERM 1840.

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108 458

KING v. BAILEY.

1. The provisions of the 3rd sect. of the "act to prevent fraud," (R. C. 1835, p. 263,) do not affect the rights of creditors secured by the 2d sec. of the same act; and, a purchaser at a sale, under an execution in his own favor, does not lose any of the rights of a creditor, under said act.
2. The possession of the wife is the possession of the husband.
3. Possession of personal property by the vendor after the sale, whether the same were absolute or conditional, is fraudulent and void, in law, as against creditors, prior or subsequent.

Error to the Circuit Court of Gasconade County.

Frissell for Appellant.

The following points are insisted on by the plaintiff in error. 1st. That where possession of a chattel remains with an insolvent, contrary to or not in accordance with the deed conveying it, is fraud per se as to creditors. *Edwards vs Harbin* 2 term Rep. 587; *Hamilton vs. Russell*, 1 cond. Rep. 318; *Hodgson vs. Butts*, 1 cond. Rep. 476.

2nd. That evidence of indebtedness of Hinton was proper for the consideration of the jury and ought not to have been excluded. *Stat. of Mo. 250, s. 4; Hoid's lessee vs Longworthy*, 6 Cond. Rep. 275; *Stat. of Mo. 283, s. 2 & 3.*

3rd. That there being no evidence offered that the defend-

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ant King had any notice of the conveyance of Hinton to Bailey, either actual or constructive, the instructions of the court being speculative and hypothetical, and proceeding upon the supposition that such notice existed, are erroneous.

4th. That the oral instructions of the court to the jury without the consent of the defendant below is error under express provisions of the statute. Acts of 1738-9, 27, s 2.

Cole for Appellee.

1st. It is insisted that the sale from Hinton to Bailey under the above circumstances was valid in law against King, the judgment creditor.

2nd. The circuit court on the trial of the above cause committed no error prejudicial to appellant.

Opinion of the Court by Tompkins Judge.

Bailey brought his action of detinue in the circuit court of Gasconade county against King, where he obtained a judgment, and to reverse that judgment King prosecutes this writ of error.

On the trial of the cause, Bailey gave in evidence a mortgage executed to him by Jacob Hinton, by which Hinton sells to Bailey, in consideration of the sum of four hundred dollars in hand paid, a negro girl slave named Joann, provided that if said Hinton should, within one year thereafter, pay the principal to the said Bailey with interest thereon, at a rate provided in a note executed at the same time by Hinton, then the mortgage to be void, &c.

This mortgage was dated on the 12th day of October 1837. It was recorded, but not in conformity to the provisions of the statute. A witness proved that after the execution of the instrument Bailey paid over two hundred dollars to Hinton, and in a few days thereafter he paid the remaining part; and that after the execution of the instrument Hinton called the girl into the room, where he and the plaintiff Bailey were, and said here is the girl, she is yours, I deliver you possession of her; that said Hinton's wife then requested him to leave her the said negro until spring, as she had a young child and no nurse, that Hinton's wife was a cousin of Bailey, to which Bailey assented. The

possession of King the defendant was also proved. Possession of the slave remained in Hinton till it was taken possession of by a constable in virtue of an execution issued by a justice in favor of King, the appellant.

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The defendant King, appellant here, then offered in evidence certain judgments obtained by himself before a justice of the peace.

One for \$72 debt, and \$1 96 interest.

“ “ \$110 debt, and \$6 41 interest.

“ “ \$150 debt, and \$6 72 interest.

The two first of these judgments were excluded, and the latter was admitted to be read in evidence to the jury.

The defendant then offered in evidence two executions one for \$74,56 debt and damages; the other for \$117 58, debt and damages, they were both excluded, and a third execution for \$122 93½ was suffered to be read in evidence.— By virtue of this execution the negro girl was sold, and King the plaintiff in the execution became the purchaser.

The defendant prayed from the court these instructions following:

1st. If the jury believe from the evidence, that after the execution of the mortgage of the slave Joann by Hinton, to the plaintiff, that Hinton remained in the possession of said slave, then the mortgage of the said slave is fraudulent and void, as regards the said defendant.

2nd. If the jury believe that there was a sale or mortgage of the said slave, by Hinton to Bailey, and that Hinton remained in possession of said slave, after such sale or mortgage, that such possession was fraudulent and void as against existing creditors.

3rd. That if they believe that the plaintiff purchased the said slave for a valuable consideration from Hinton, but permitted the slave to remain in his possession after such purchase, and that said slave while in Hinton's possession was sold to pay his debts then they must find for the defendant.

4th. That unless possession accompanies the sale of personal property, or other deed of conveyance is executed by the vendor to the vendee, and delivered to the vendee, and the same is duly acknowledged and recorded, that it is void as to creditors.

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5th. That there is no evidence in the case, that there was any bill of sale or other conveyance, conveying the slave in dispute from Hinton to Bailey executed by Hinton and duly recorded.

6th. That every bill of sale of personal property, or other conveyance, made with intent to hinder, delay or defraud creditors, or other persons, of their lawful actions, or demands, as against creditors, prior or subsequent, is fraudulent and void.

7th. That unless the jury believe there has been a demand of said slave from the defendant either by the plaintiff or his agent, and a refusal to deliver such slave on such demand, they must find for the defendant.

The circuit court refused to give these instructions and instructed the jury as follows:

1st. If they believe that the conveyance was made by Hinton to delay or hinder creditors, or others, of their lawful demands, it is fraudulent and void.

2nd. But If the defendant King had notice of the conveyance aforesaid, at the time of his purchase, unless they believe that the plaintiff Bailey was a party or privy to the fraud intended, then the conveyance is not void in favor of the defendant.

3rd. That if a conveyance of personal property is made, whether the same be absolute or conditional, the possession must accompany the sale or transfer, otherwise it is fraudulent and void as to creditors or subsequent purchasers.

4th. That if the jury believe that Bailey did bona fide and really permit the said slave to remain with the wife of Hinton for the purpose of nursing the child of said Hinton, and that it was not a pretense to avoid the imputation of fraud resulting from the possession remaining with Hinton after the sale to Bailey, that is a circumstance sufficient to take the transaction out of the operation of the principle above stated, and in that event the jury will determine from all the circumstances detailed in their hearing whether the conveyance was made with intent to defraud creditors or purchasers, and that Bailey was a party or privy to the fraud, then they will find for the plaintiff.

The counsel of King, the appellant, except to the opinion of the court in refusing the instructions prayed by himself, and in giving its own instructions.

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The second section of the statute to prevent fraud, provides that every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or goods and chattels, &c., made or contrived with intent to hinder, delay or defraud creditors, or other persons, of their lawful actions, damages, debts, forfeitures or demands, as against creditors or purchasers, prior or subsequent, shall be void. And by the third section of the same act it is provided that, "no such conveyance or charge shall be deemed void in favor of a subsequent purchaser, if the deed or conveyance shall have been duly acknowledged or proved and recorded, or the purchaser have actual notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefitted by such charge, was party or privy to the fraud intended."

This section, it is to be observed, is a saving out of the second section of the act in favor of the person who records his deed, or other conveyance, against the rights of subsequent purchasers. The rights of creditors, secured by the second section, are not in any way affected or impaired by the provisions contained in the third section in favor of those who record their deeds. King was a creditor of Hinton, and by the act of purchasing this negro at a sale under his own execution, he did not lose any of the rights of a creditor. The third section saved the rights of those who recorded their deeds, duly acknowledged, against subsequent purchasers by private contract with the original owner. As, for example, if King had purchased from Hinton, with the knowledge of Bailey's previous purchase, whether that knowledge were actual or constructive is immaterial. King then being a creditor is not affected by the provisions of the third section. At common law if a creditor take an absolute bill of sale of goods from his debtor, but agree to leave them for a limited time in his possession, and the debtor die while in such possession, whereupon the creditor takes and sells the goods, he will be liable to be sued as an executor *de son*

The provisions of the 3d sec. of the "act to prevent fraud," (R. C. 1835, p. 283) do not affect the rights of creditors secured by the 2d sec. of the same act; and, a purchaser at a sale, under an execution in his own favor, does not lose any of the rights of a creditor, under said act.

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The possession of the wife is the possession of the husband.

Possession of personal property by the vendor after the sale, whether the same were absolute or conditional, is fraudulent and void, in law, as against creditors, prior or subsequent.

tort for the debts of the deceased; for the debtors continuing in possession is inconsistent with the deed, and fraudulent against creditors. See *Edwards vs. Harbin*, 2nd Term Reports: 587, and cases there cited. Also *Hamilton vs. Russell*, 1st Con. Rep. 318; and *Hodgson vs. Butts*, 1 Cond. Rep. 476. It was certainly proved that Hinton called the negro into the room where he and Bailey were, and delivered her into his possession; but he instantly agrees to leave her with Hinton's wife in Hinton's house, till the spring of the next year. The possession of Hinton's wife is the possession of Hinton himself, and it is a possession inconsistent with the deed. Such was their own understanding of the deed of mortgage; and a very correct interpretation too. If the provisions of the statute are to be evaded by such acts as this, it is in vain the Legislature have enacted it. The object of the act is to prevent fraudulently disposed persons from obtaining credit by a false show of wealth. And this object would be defeated if the purchaser were permitted, after a formal delivery, to restore the slave immediately into the possession of the vendor without incurring the penalties of the act of Assembly. As to the law of this case, then, it is quite immaterial whether or not King were informed of Hinton's sale and conveyance of this slave to Bailey; and it is also quite immaterial whether or not Bailey were party or privy to any fraudulent intention of Hinton. The act is one deemed fraudulent in law, and therefore void as against a creditor, and King was a creditor. The instructions given and refused must then be examined by this rule. The first instruction asked by King, the appellant, should then, in my opinion, have been given, King being a creditor purchasing at a sale under an execution in which he is plaintiff.

The second instruction is objectionable only as it requires the court to do over again what the first instruction asked. Its terms vary a little. It requests the court to tell the jury that if they found that there was a sale or mortgage, and that Hinton remained in possession after such sale or mortgage, that such possession was fraudulent and void as against existing creditors.

There was evidence of a mortgage but of no sale, other

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than what was a part and parcel, or perhaps the essential part of the mortgage; and it was also proved that King, the defendant in the circuit court, was an existing creditor at the time the mortgage was made. In this view of the second instruction it appears to me to have been totally useless, and that no evil could arise from rejecting it if the first had been given.

The third instruction is liable to no other objection than that, in substance, it was asked in the first, and is also liable to an objection which may perhaps be too special. It asks the court to instruct the jury that if among other things they believe the slave, while in the possession of Hinton, was sold to pay the debts of Hinton. Now when the slave was sold it was proved to be as the law requires, in the possession of the constable. But it is not to be presumed that the circuit court rejected it on that account, and we may say that the material part of it was accurate enough, and should have been given.

The fourth instruction was very well refused, for there is no provision in the statute to give any validity to a bill of sale of personal property as against a creditor, by having such bill of sale recorded, other than it would have had without being recorded. The act of recording gives the purchaser under such bill of sale greater security against subsequent purchasers only. And as before observed, these subsequent purchasers are voluntary purchasers at private sale, King in this case asked the instruction to his own injury, for he was a creditor, and by becoming a purchaser at the constable's sale, did not lose the rights of a creditor.

The fifth construction ought to have been given, and in all probability would have been given had it been asked in plain terms. The substance of that instruction is that the mortgage produced in evidence was not duly acknowledged and recorded. This meaning was probably not so easy to be extracted by the circuit court, surrounded as it commonly is by a crowd of spectators, and liable to frequent interruptions.

The sixth instruction should have been given.

The seventh instruction should have been refused as it

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was: King as purchaser at the constables sale could acquire no right to make a demand by Bailey necessary.

The first and third instructions given by the circuit court are very correct.

The second and fourth instructions seem to be objectionable. According to the construction of the second and third sections of the statute above given; King stands before this court as a creditor purchasing at a sale under his own execution, a character favored by the law. The exceptions to which, the circuit court refers in the second and fourth instructions are such as are provided for a purchaser, who records his only acknowledged deed, against a subsequent voluntary purchaser at private sale; or such a purchaser who purchases with the knowledge of the previous conveyance not recorded.

The counsel of King does not seem to have urged very strenuously the point that the circuit court rejected the copies of the judgments offered in evidence. They were in nothing material except to raise the presumption of a fraudulent combination between Hinton and Bailey to hinder and delay King in collecting his demands from Hinton; and as it does not appear that Bailey was affected with any notice of Hinton's debts they were well enough rejected by the circuit court.

For the reasons above given the judgment of the circuit court ought in my opinion to be reversed, and Judge McGirk concurring in that opinion it is accordingly reversed, and will be remanded.

McGirk Judge.

I concur in this opinion, except that I believe the judgments offered in evidence were competent evidence in the cause. Although it might not have been proved that Bailey knew of Hinton's indebtedness.

Napton Judge.

I do not concur in this opinion, except so much of it as relates to the exclusion of the judgments offered.

R. and A. P. TURLEY v. TUCKER.

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1. The possession sufficient to maintain the action of trover must be a lawful possession, one trespasser or wrong doer cannot maintain trover against another.
2. Persons cutting timber on the lands of the United States, not being actual settlers, are mere trespassers, and do not thereby acquire any property, either general or special, in the timber.
3. Trespassers on the lands of the United States occupy the same position with trespassers on the lands of private individuals. (James and Massay v Snelson, 3. Mo. R. p. 393. overruled.)

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6	583
61a	294
6	583
64a	350

Appeal from Ste. Genevieve Circuit Court.

Cole for Appellant.

1st. The circuit court erred in refusing to give instructions 1, 2, 6, 7, 8, 9, 10, as required by defendant, and in giving the instructions asked by plaintiff.

2nd. That the appellees were trespassers, and cut the timber in the declaration mentioned on the land of the United States, without any view to settlement, cultivation, or obtaining an interest therein, and as such trespassers acquire neither in virtue of public policy, nor law, a general or special property in the timber cut so as to enable them to maintain the above action.

3rd. That the plaintiffs must shew in order to maintain the above action, that they had either a general or special property in the timber converted, and that they had the actual possession thereof, or the right to immediate possession.

4th. That when a plaintiff recovers in trover the defendant by operation of law obtains a title to the property in controversy, and the plaintiff gets the value in damages 2, Kent Comm. 319.

5th. That in trover defendant may shew a little in a stranger paramount to that of plaintiff as a bar, 14 Johns Rep. 128.

6th. Trover may be brought by the person having either a general or special property, but a recovery by one is a bar to an action by the other 1, Chitty plea 152.

7th. Absolute or general property in chattles is where possession is united with the exclusive right to enjoy them, special property is the mere possession of property by one with the assent of the true owner, Webb v Fox. 7, Dar and East, 391.

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8th. That there was no law of the government of the United States at the time the above trespasses were committed by appellees, that gave them authority to cut timber upon the public domain, or a right to such timber, or a right of possession in the land without the purchase thereof according to law (act of Congress 19th June 1834.)

Brickey for Appellee.

1. Can the action of trespass or trover be sustained by one who cuts wood or timber upon public land, the right of soil remaining in the United States, against a wrong doer who takes it off and converts to his own use? 2, Stark Evi. 837, 2, Phil. Evi. 121, 6, Bac. Abr. 707; 2, Saunders Rep. 47 (note 1) 1 Camp, Rep. 551, (Greenstreet v Carr) 3 Mo. Rep. 393, (James and Massie v Snelson.

2nd. Did the court misdirect the Jury as to the law of the case, and thereby commit such error as to entitle the defendant to a new trial? 2, Cains Cases 83 (Depyster v Colo Ins.) 3. Mo. Rep. 382 (Homes v McKenney.)

3d. The court was not bound to give instructions to the Jury upon abstract propositions of law: Therefore, the instructions asked for by the defendant and not given, were properly rejected by the court, there being no evidence in the case to warrant the court in giving such instructions, and had they have been given it would have been error.

4th. The deposition of Burks offered by the defendant was very properly excluded by the court.

5th. The 3d, 4th and 5th instructions asked by the defendant and given by the court contain all the law of this case scattered through all the other instructions which were asked for and refused by the court.

Opinion of the Court by Napton Judge.

The Turleys sued Tucker in an action of trover, and had a judgment for three hundred and seventy five dollars. On the trial the following facts appeared: The plaintiffs were owners of a saw mill, and in the spring of 1837 employed some ten or twelve hands to cut down trees in a pinery about three miles from their mill, and within a half a mile of the saw mill, belonging to Tucker.

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The hands employed cut down twelve or fourteen hundred trees, cut off the tops, and marked them in convenient lengths for stocks. The Turleys hauled away some of the logs, but Tucker some time in the fall hauled away some two or three hundred of the same logs. Tuckers mill sawed from twelve to twenty five stocks per day, and Turleys mill ran about one third of the time, and sawed from one thousand to twelve hundred feet of plank per day. It was admitted that the logs were cut on the public land.

The instructions refused to be given by the court, at the instance of defendant, it is unnecessary to insert, as they were in substance that the action could not be sustained on the facts above specified. Two of them will be sufficient to illustrate some points in the case. The seventh instruction which the court refused was as follows: "If the jury shall find from the evidence in the cause that the plaintiff cut down the timber, in the declaration mentioned, without a bona fide view to its use, and did not use the same, the timber being and appertaining to the public domain, and lying cut down from the first of March 1837 until the first of September 1837, then the said plaintiffs are trespassers against the United States, and cannot recover against defendant for using a part of said timber." The eighth instruction, which was also refused, was as follows: "If the jury shall find from the evidence that the plaintiffs cut the timber in the declaration mentioned upon the land of the United States without any view to settlement or cultivation of the land, or acquiring a right or interest therein, then the plaintiffs are trespassers and acquired no interest in said timber by virtue of said trespass, and cannot recover in this action."

The court gave the following instruction: "Although the logs might have been cut by the plaintiffs on public land for their own use yet they acquired such property in the logs, as will enable them to maintain an action of trover for the logs against a wrong doer."

A motion was made for a new trial which was overruled. The case is brought here by appeal.

The decision of a majority of this court in the case of *Massie and James v. Snelson* (3d Mo. Rep. 393) undoubtedly

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embraces the only material question arising from the record now before the court. In venturing to question the conclusions to which the court in that case arrived, it is proper that I should examine somewhat at large the grounds of the decision.

To maintain an action of trover at the common law, the plaintiff must have a property either *absolute* or *special* in the possession or right to the immediate possession of the goods which are the subject of controversy, 2, Whea. Sel. 1050, 6, Bac. Abr. Tit, trover C. There is no pretence that the plaintiff had any absolute property in the subject matter of the controversy. Had they such a special property, would maintain trover?

The special property spoken of by the books as sufficient to maintain the action of trover, is of two kinds and of two kinds only. The first is that property which is founded on a mere possession, held subject to the claims of the absolute owner. The other is a temporary property without possession, only one instance of which I have seen recorded in the books, (Roberts vs Wyatt, 2 Taun. 26S,) and which has no affinity to the present case.

The first class of special property arising out of mere possession, and which will sustain the action of trover against a mere wrong doer, is the only kind which bears upon the case under consideration. The authorities are very clear that mere possession is sufficient *prima facie* evidence of property to maintain this action against a wrong doer.

1st. Did the plaintiff by cutting the timber on the land of the United States acquire such possession?

The entire argument upon which the plaintiffs' right is sustained, is founded, I think, upon a mistaken interpretation of the general law maxim just alluded to. The cases of special property referred to by the authorities in illustration of that maxim, are that of a bailee, a carrier, a lessee for life, a lord who seizes an estray, a sheriff who has levied on goods, and the finder of a jewel. In all these cases, and every other instance of special property founded on possession, the possession has been a peaceable and lawful possession, or a possession acquired by some shadow of title from

the absolute owner. There is no case of a mere trespasser, acquiring by his trespass, constructive possession. It seems to be contrary to the settled usages of law, for courts to interfere in such cases, and aid one trespasser against another. For the peace of society, the law will interfere so far as to protect actual possession, but will not raise a presumptive possession as the foundation of a special property. This appears clear not only from the very language in which this doctrine is couched, but from the reasons by which law writers have supported it. Mr. Starkie says, (3 Stark. Evi. p. 1487.) "If the action be brought against a mere wrong doer, the mere fact of possession by the plaintiff is usually sufficient evidence of title, even although the plaintiff claim under a title which is defective, for the possession of property is, as has been seen, *prima facie* evidence of ownership."

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The only reason then why possession is sufficient to maintain this action is because it is *prima facie* evidence of ownership, either absolute or special. The possession of bailee's, carriers, &c., is evidence of their ownership, and that evidence could not be rebutted by showing the absolute property in another, in a suit of this character, because that absolute property would not be inconsistent with such ownership as they claim. They hold by the express or implied consent of the absolute owners, but in the case before the court the very evidence which establishes the possession proves also that possession to be tortious, and consequently the plaintiff's possession being only *prima facie* evidence of property is rebutted by establishing a conflicting claim to an absolute property in another.

But let us examine the cases which have been relied on, and which are certainly the strongest to sustain the plaintiff's claim. In Sutton vs. Buck, (2 Taun. 302,) it was proved that the plaintiff being possessed of a cottage at T, and an inhabitant there, and as such, claiming a right to cut rushes upon the T. common for his own use, cut down five or six loads of rushes, which defendant seized and carried away. The court sustained the action. The court said: "Indeed if a person hath no color of right at all to cut down

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rushes, or to take away other things, he cannot by cutting the rushes or taking the thing without any color of right acquire property therein. But in the case at bar the plaintiff proved he had a right to cut the rushes and that he did cut them; and we are all of opinion that he did thereby acquire a property therein." There is nothing in this case to countenance the doctrine held in *Massie and James vs. Snelson*, unless it can be shown that those who trespass on the lands of the United States are differently situated from ordinary trespassers upon the lands of private persons. This we will presently enquire into.

The possession sufficient to maintain the action of trover must be a lawful possession: one trespasser or wrongdoer cannot maintain trover against another.

The next case bearing on this point is the case of *Bassett vs. Maynard*, (Cro. Eliz. 819) the substance of which may be found in a note of Mr. Williams, (2 Saun. 47, c.) sir T. Palmer being seized of a great wood, granted to Cornford as many trees as would make six hundred cords of wood, Cornford assigned his interest to plaintiff, afterwards sir T. Palmer granted to defendant so many trees as would make four thousand cords of wood to be taken at his election. The plaintiff by the assignment of Sir T. Palmer cut down the trees in question, and the defendant claiming by virtue of the grant, took them, and it was found there was sufficient wood left for defendant. It was held that the action was maintainable even admitting the grant to plaintiff to have been void for, says the reporter, "by the cutting down of them he had possession, and a good title against defendant, and every stranger, and being cut down it was not lawful for defendant to take them." Here the plaintiffs claimed a right to cut the wood under a grant from the owner of the land. It was *prima facie* no trespass, and as we shall see hereafter, in investigating the nature of the defence which may be set up in a case of this kind, the defendant could not rebut the *prima facie* title arising from possession, by showing that the deed was void, because he claimed no title himself under the rightful owner inconsistent with the right of the plaintiff. It was proved that there was wood enough for both the grantees. This observation will apply to the case of *Woodson vs. Newton*, (2 Stra. 777)

in which, as well as the other case cited, the plaintiff claimed under and by consent of the absolute owner.

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The case of Schermehorn vs. Van Volkenburgh, (11 Johns R. 529,) is illustrative of the principle now contended for. That was a case of a sheriff who levied on chattels and took possession, and this possession the court held to be sufficient evidence of a special property to maintain trover. But the court in this case proceed to say:

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"There is no doubt that a defendant in an action of trover may show title in a third person," and accordingly reversed the judgment of the court below, because it had refused to admit evidence offered of a paramount title in a third person.

The case of Kennedy vs. Strong (14 Johns. R. 128,) turned upon the admission of the defendant that plaintiff had property, and the court would not therefore permit him after such acknowledgment to set up a title in a third person.

In Rotan vs. Fletcher, (15 John R. 207,) the defendant was allowed to set up property in a third person.

It has also been held that the defendant shall not be allowed to set up property in a third person, without some shadow of claim in himself; 11 Wend. 54; and Wheeler A. C. L. 223. But, it will be observed, that this was a question of defence, and not of title in plaintiff. All the cases concur, however they may differ as to the kind of defence allowable, that the plaintiff must first show a prima facie case, and that must be by showing a property, either general or special; until that is done, the question of defence cannot arise.

It remains to be considered, whether the situation of the plaintiff is different from that of any ordinary trespasser on the lands of a private person. On this head I confess my inability to perceive the force of the reasoning of this court in the case of Massie v. Snelson. The court did not undertake to say what the law would have been, admitting the plaintiffs to have been mere trespassers, but proceed to assert that the *settlers* on the public land are not trespassers, and consequently allowed the plaintiffs to recover. Now from the report of that case, I have seen no proof that Massie and James were settlers on the public lands; on the con-

Persons cutting timber on the lands of the U. States not being actual settlers, are mere trespassers, and do not thereby acquire any property, either general or special, in the timber.

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trary it might be fairly inferred from the testimony that they were owners of a considerable tract of land, and no doubt of the soil on which their iron works and other improvements were located, and merely supplied themselves with wood from the vacant lands adjoining their premises. I apprehend there is a vast difference between this and settling the public lands. By the *settlers*, I understand those who locate on the public lands, with a view to a settlement, enclose fields, build cabins, and cultivate the soil, or take some preparatory steps for these purposes. These settlers have undoubtedly been viewed by the federal government in a favorable light, and their improvements have been from time to time secured to them by a series of just and equitable laws, called pre-emption laws. Their rights have also been repeatedly recognized by this court, and no one is more willing than myself that the protection of the judicial as well as legislative departments of government should be continued over this meritorious class of citizens.

But I am unable to see, what merit can be claimed by him who owning thousands of acres himself, yet prefers to get his firewood and rails, and timber, from the adjoining lands of the government, with no view to their improvement, but to the destruction of all the value which they possess. The practice I am aware is general, nor do I undertake to say it is morally reprehensive. It is not the province of this court to decide questions of ethics, but I imagine the persons who commit these trespasses do not for a moment suppose, that they can claim any *merit* with the government for so doing, or that they can call upon the courts of law to assist them.

Trespassers on the lands of the United States occupy the same position with trespassers on the lands of private individuals. (James and Massie v. Snelson, 3 Mo R. p. 393, over ruled.)

I conclude then that the plaintiffs, who trespassed on the lands of the United States, occupy the same position with a trespasser on the lands of his neighbor, and could not, by such trespass, acquire any property, either general or special. The argument *ab inconvenienti*, suggested by the court in the case of Massie vs. Snelson, and urged at the bar in this case, is entitled to no weight in a case like the present. Whatever inconvenience may result from the law, as it now stands, it is the province of the Legislature to remedy. In-

finitely greater danger must result to our rights of property by the incroachment of the judicial tribunals upon the precincts of the legislative department, than can possibly ensue from the expected scuffle among the trespassers on the public lands.

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But these results are not likely to arise. Whenever there is an actual settlement, or the preparatory steps with a view to settlement, it is clear that the principle of this case can have no application. When such a case occurs it will be time enough to investigate that matter. No pretence is made here that the plaintiffs had any such designs, and no proof of any actual possession, distinguished from that constructive possession which property, either general or special, can give. But the facts disclosed in the testimony on record, present a practical commentary upon the great *inconvenience* of the doctrine in *Massie vs. Snelson*. † If a person can acquire property by making rails, or cutting saw logs on public land, may he not acquire as good a right by merely felling the trees? When does this right commence and when does it cease? What will be evidence of abandonment, or can there be none? If A goes into the neighboring forests, and by the aid of a hundred hands cuts down the timber for a mile around, intending to haul them at his convenience to his mill, or to convert them into rails, at such times as suits his convenience, how long must his neighbor, B, wait before he can undertake to make use of the fallen timber? Even according to the customs of the country, so often alluded to at the bar, and which this court is desired to engraft into the common law of the land, such practices are not considered admissible, or as giving any title in the trespasser. ¶ It is held equitable, and with some propriety, that a man must *cut and split* as he goes, if his object be rails, or if saw logs, he must cut down and cut up the trees in proper lengths, in order to give him a lien. But according to the doctrine now sought to be established, the trespasser may destroy the timber for miles around, perhaps without any means of availing himself of it before it will be rotten and useless, whilst his neighbors are utterly deprived of the benefit of participation, and obliged to haul their firewood, rails or saw logs,

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from a distance of several miles over the very lands which the first trespasser has made bare. The truth is, when we leave the established landmarks of the law we are completely at sea, and it will be left to the moral sense of each judge or jury to decide these nice questions of honor and equity.

To allow a recovery in this case would, in my opinion, be subversive of the well established and long settled principles of law, which, whether wise or unwise, this court is bound to administer. Judgment reversed.

Judge McGirk dissenting.

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ROUSSIN ET AL V. BENTON.

A lessor cannot maintain an action of trespass *quare clausum fregit*, while there is a tenant in possession.

Error to the Circuit Court of Washington County.

Scott, Ziegler and Frissel for plaintiff in Error.

1st. That the owners of the land cannot maintain the action of trespass unless the possession be vacant or he be himself in the actual possession. If there be a tenant in possession he, not the landlord, must bring the action. And it is immaterial whether the injury complained of be done to the possession or to the freehold, *Campbell v Arnold* 1 John Rep. 311 *Welcham v Freeman* 12 John Rep. 183.

2nd. That the action of trespass does not lie against one in the actual possession of land afterwards purchased from the United States by a different person. He may be a trespasser as to the United States, but not as to the purchaser, *Stryvesant vs Thompkins* 9, J. Rep. 61.

3rd. That the certificate of the receiver in the form lately used under the pre-emption law of 1838, is not such evidence of title as to enable the holder to maintain the action of trespass against one in the actual possession of the land designated in the certificate.

Cole for defendant in Error.

1st. It will be insisted that the circuit court did not err in refusing the evidence preserved by first bill of exceptions.

2nd. That there was no error in refusing defendants in-

structions and in giving the substitute as shewn by second bill of exceptions. SEPT. TERM
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3rd. That the certificate of the receiver was legal evidence in the cause. Roussin et al.
v.
Benton.

Opinion of the Court by Tompkins Judge.

Benton brought an action of trespass against Roussin and others in the circuit court of Washington county, when judgment being given for him, the defendants prosecute their writ of error in this court to reverse the judgment of the circuit court.

On the trial of the cause the court was prayed to instruct the jury, that if they believe from the evidence that Lord was in possession of the premises as tenant to the plaintiff at the time the trespasses were charged to be committed then Benton could not maintain his action of trespass. This instruction the court refused to give, and instructed the jury that Lord might recover for injuries done to his possession, but that the injury complained of was an injury to the freehold, and that for such injury the owner of the freehold could maintain his action of trespass, although Lord might be his tenant in possession. The opinion of the court is excepted to, and the giving of the instructions is assigned as error.

The instruction given by the court was wrong. No evidence of the possession of Lord appears on the record. The instruction asked as well as that given raise the presumption that such evidence was given. But whether such evidence were given or not, the instruction being unfavourable to the defendants, it was error in the court to give it, see 1 Johnson 511 and 12 Johnson 183 where it is decided that a lessor cannot maintain an action of trespass *quare clausum fregit* while there is a tenant in possession. A lessor can
not maintain
an action of
trespass *quare
clausum fregit*
while there is
a tenant in
possession.

The judgment of the circuit court ought to be reversed, and all the court concurring it is reversed.

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Loughridge

v.

The State.

LOUGHRIDGE V. THE STATE.

A freeman, accessory to a felony committed by a slave, is punishable in the same manner as though the principal was a freeman.

Appeal from the Circuit Court of Jefferson County

Bricky Circuit Attorney.

1st. Did the circuit court err in overruling the defendants motion to compel the State to elect which count of the two she would go to trial upon?

2nd. Did the circuit err in refusing to give the jury the 3rd instruction asked for by the defendant?

3d. Is there error in overruling the defendants motion for a new trial?

4th. Did the court err in giving the jury further instructions when they came into court and made the request?

Opinion of the Court by Tompkins Judge.

Loughridge was indicted in the St. Louis county, and on his application the venue was changed to Jefferson county. He was there found guilty, and appeals to this court.

He was indicted for aiding Perry and Hanson, two slaves, in committing, 1st, an assault with intent to kill: 2nd. an assault and battery, with intent to kill, on one Reuben Cranmer.

One of the witnesses states, that some time in the month of February last, on the day that Cranmer was shot, he, passing in the upper part of the city of St. Louis, heard the report of a gun, and heard Cranmer say, that he was shot: the witness stated that he immediately looked to the stable of Loughridge where he saw smoke, and thought that the gun had been shot from that place; that he and another person went towards the stable to see that none should escape, and to find out if possible who had shot the gun; that while they approaching the stable Loughridge come out of his dwelling house and asked who was shot, who was killed, or words to that effect; that he was laughing and seemed highly pleased; that he told Loughridge, he knew that he Loughridge did not shoot the gun, but that it was shot from the stable, and he intended to see who had shot it; that Lough-

ridge said he had sent the negroes Perry and Hanson to the stable to take care of his horses and hay, and that no man should search his stable; that he was responsible for what the negroes did, and then called for his gun, and that it was brought to him by his son; that he raised it partly up to his face and said that he would stand up to any man who would face him with a gun; that in a short time the negroes came out of the stable, got into a wagon and went down town; that Loughridge then got on his horse and in a few minutes rode off.

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The State

Cranmer stated that in the month of February last, whilst he was engaged in cutting some wood in front of his house, he was shot by some one from the stable of Loughridge; which is about from forty to sixty feet from the house of the witness: that the ball entered his right shoulder and injured him so seriously that he has not been able to perform any labour since that time; that he then went into his house, and in a few minutes thereafter, he saw Loughridge in his own yard with his gun in his hand and laughing.

A witness named Moore stated that on the day Cranmer was shot, in the month of February last, he was sitting in his own door, near where Cranmer and Loughridge lived, when he heard the report of a gun and cries of murder; that he immediately started to the place from which he supposed the gun had been shot; that on his arrival at the stable of Loughridge, which is within sixty feet of Cranmers house, he saw Mr. Hutchison (the first witness) and another person whom he did not know; that Loughridge was in his yard with his gun in his hand laughing and swearing; that he discovered Cranmer had been shot, and immediately went to town after a constable; that he found Mr. Gordon, a constable, and returned to the stable and found a gun (Hutcherson testified to the same gun) which was hid in the stable loft of Loughridge; that the gun appeared on examination to have been lately discharged. Other witnesses testified to the same facts, and one stated a few days before Cranmer was shot he met Loughridge in the streets of St. Louis, and that he commenced a conversation with him in which he spoke, harshly of Cranmer, and said that he would shoot Cranmer in less than ten days.

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The State.

The counsel for the prisoner prayed the court to instruct the jury, that the jury cannot inflict by their verdict imprisonment, that the defendant cannot be punished by imprisonment in the Penitentiary under the present indictment.

The counsel took exception (as a matter of form I suppose) to some instructions given by the court, which will not be noticed.

A freeman,
accessary to a
felony com-
mitted by a
slave, is pun-
ishable in the
same manner
as though the
principal was
a freeman.

By the 5th section of the 9th article of the act concerning crimes and their punishment, it is provided, that every person who shall be an accessary to any murder, or other felony before the fact, shall be, upon conviction, adjudged guilty of the offence in the same degree, and be punished in the same manner, as herein prescribed with respect to the principal in the first degree; and by the 31st section of the second article of the same act p. 171, of the digest of 1835, it is further provided, that every person who shall, on purpose, and of malice of aforethought, shoot at or stab another, with intent to kill, shall be punished by imprisonment in the penitentiary not exceeding ten years. But it seems that in the case of slaves being convicted of any offence punishable by this act with imprisonment in the penitentiary, the punishment is changed by a subsequent act viz: the act of 1836, and therefore it is that the counsel for the prisoner insists that the prisoner cannot be punished by imprisonment in the penitentiary under this indictment. If the prisoner were a slave this argument would be irresistible; but as the presumption that he is a free man arises from the face of the record he must be held to the punishment prescribed for a freeman. The fifth section of the ninth article does not provide that the accessary shall be punished in the same manner that his individual principal would be, but in the same manner as is in that act prescribed with respect to the principal in the first degree. The circuit court there committed no error in refusing to give this instruction.

But a new trial was also moved, and it was charged that the court committed error in refusing that, as well as in refusing the instruction above mentioned. The evidence was such that it appears to me no jury ought to hesitate a moment to find a verdict of guilty on it.

For the reasons above given, the judgment of the circuit court ought in my opinion to be affirmed, and such being the opinion of the other judges of this court it is accordingly affirmed.

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Loughridge
v.
The State.

MATTHEWS V. BOAS & MURPHY.

Action of Trespass—defendants pleaded *severally* liberum tenementum, and *jointly* liberum tenementum as to one, and license as to the other. Plaintiff inadvertently failed to reply to the last plea in term time, and at the next term judgment was entered for defendants: held, that as the last plea required two replications, which could not be filed without leave of the court, and especially as the plea was unnecessary, the court should have permitted the plaintiff to reply at the subsequent term.

Error to the Circuit Court of Washington county.

Frissell for Plaintiff in Error.

1st. That the plea purporting to be the joint pleas of the defendants not being an answer, or even purporting or professing to be an answer to any antecedent pleading, must of necessity be treated as a nullity, and can neither require a replication nor a demurrer.

2d. That if replications could be filed, they could only be filed during court, because the plea absolutely requires two replications, and two replications to one plea can only be filed by special leave of the court. Stat. of Mo. 460, sec. 30.

3d. That this plea as to Wm. D. Murphy is identical (not several) with another plea filed at the same time, and the law does not require replications to two identical pleas. Stat. of Mo. 459, sec. 24.

Cole for Defendants in Error.

First. Did the circuit court err in refusing the motion of plaintiff for judgment?

Secondly. Did the court err in rendering judgment of non pros upon motion of defendant?

It is insisted that the court erred in neither.

Opinion of the Court by Tompkins Judge.

Matthews brought an action of trespass against Boas and

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Matthews
v.
Boas & Mur-
phy.

Action of
trespass—de-
fendants plea-
ded *severally*
liberum tene-
mentum, and
jointly liber-
um tenemen-
tum as to one
and license as
to the other.
Plaintiff inad-
vertently fail-
ed to reply to
the last plea
in term time,
and at the
next term
judgment was
entered for
def'ts: Held,
that as the
last plea re-
quired two re-
plications,
which could
not be filed
without leave
of the court,
and especial-
ly as the plea
was unneces-
sary, the
court should
have permit-
ted the plain-
tiff to reply
at the subse-
quent term.

Murphy. They pleaded severally not guilty, and liberum tenementum. To these pleas the plaintiff replied, and issues were joined. But the defendants pleaded jointly that the place in which the trespassers were charged to have been committed, was the freehold of one of them, and that the other entered &c. by his permission. To this plea the plaintiff failed to reply in term time, and at the subsequent term, judgment was, on the defendant's motion, entered up against the plaintiff.

The plaintiff contends that he could not reply to this plea in vacation, as it required two replications, leave of the court being necessary to authorise him to file two replications to one plea; see sec. 30 of third article of the act to regulate practice at law. He was allowed to file a replication in vacation, but it must have been done within fifteen days after the close of the term when pleas were filed. It would have been more regular if the plaintiff had filed an affidavit, stating what was urged in argument, that this plea was filed late in the term and escaped his observation till late in vacation, when he endorsed thereon his demurrer. So far as the plea regarded the owner of the freehold, it was entirely useless, for he had pleaded the same before, and it was useless for him to join with the other defendant for whom only it was necessary to plead a license. As the defendants committed the first fault in filing a plea to which the plaintiff could not reply without leave of the court, which could not have been obtained in vacation, and more especially as this double pleading was by no means necessary to their defence, this court is not disposed to secure to them any advantage which they may have gained by committing the first fault. Murphy owned the freehold and had pleaded it. Boas had pleaded the same falsely as he seems to admit in the subsequent joint plea; and it seems rather to savor of vexation that Murphy should again plead liberum tenementum jointly with Boas, and make that plea double, by coupling the license to Boas in it. The judgment of the circuit court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

DODSON v. JOHNSON.

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Appeal from the Circuit Court of Perry County.

It lies upon the party, seeking a reversal of the judgment of the circuit court, to show in what that court erred.

Dodson
v.
Johnson.

Brickey for Appellant.

Authorities cited—Digest 388 sec. 1-2-3, 4 do 370 sec. S, do 369 sec. 2.

Cole for Appellee.

The reversal and dismissal of the case by the circuit court, which it is insisted was correct, for the reason that the proceedings before the justice were a nullity, and the circuit court could not make them the basis of further proceedings in the cause in that court after the irregularity was shewn, all the court could do was to place the parties in statu quo.

Opinion of the Court by Tompkins Judge.

Dodson, it is to be collected from the face of the papers, sued Johnson before a justice of the peace, and there obtained a judgment, from which Johnson appealed to the circuit court of Perry county; and that court on the motion of Johnson, the defendant, dismissed the cause.

It lies upon the party, seeking a reversal of the judgment of the circuit court, to show in what that court erred.

No transcript of the justices docket is sent up and consequently this court is not enabled to see that the circuit court committed any error in dismissing the cause. It was the duty of the appellant who seeks to reverse the judgment of the circuit court to shew in what that court erred. He having failed to do this its judgment must be affirmed by this court.

It is the opinion of each member of the court that the judgment ought to be affirmed, and it is accordingly affirmed.

Judge McGirk absent but concurred in the opinion then to be written.

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SMITH V. MATTHEWS.

Smith
v.
Matthews.

Appeal from the Circuit Court of Washington County.

An affidavit of newly discovered testimony, on a motion for a new trial, should contain an averment of due diligence.

Opinion of the Court by Napton Judge.

Matthews sued Smith before a justice of the peace on an account and recovered \$6, 12½. Smith appealed to the circuit court where judgment was again given for Matthews, Smith moved for a new trial and made affidavit that he had discovered new testimony which was material to him. This affidavit was accompanied with the affidavit of the witness discovered, as to what he knew of the matter in controversy. The circuit court overruled the motion and gave judgment from which Smith appealed to this court.

An affidavit of newly discovered testimony, on a motion for a new trial, should contain an averment of due diligence.

This court is of opinion that the affidavit of the appellant should have contained an averment that he had used due diligence. And we are further of opinion that the testimony of Lynch the newly discovered witness was no wise material. Judgment affirmed.

CLAY ET AL V. THE STATE.

Appeal from St. Francois Circuit Court.

The act of Feb. 13, 1839 (laws of Mo. session 1838-9 p. 101) giving justices of the peace jurisdiction in cases of disturbance of religious congregations, is in aid of the 27th sec. of 8th art. of the act concerning crimes and punishments (R. C. 1835, p. 209) making the same offence punishable in the circuit court by indictment. The jurisdiction of the circuit court and justices of the peace, in such cases, is concurrent.

Scott and Zeigler for Appellant.

1st. That the defendants having been tried convicted and fined with trial before the justice under the law giving to the magistrate jurisdiction in cases of breaches of the peace (see revised code 1835 page 372,) could not be indicted and again tried and punished for the same offence. State Constitution page 28, sec. 10, acts of 1835 page 214 sec. 15.

2nd. That offence charged is not indictable, the 27th sec.

tion of the act of 1835 page 209, making the offence charged as a misdemeanor being repealed by the 5th section of the act of the 13th February 1839, and which last act makes the offence triable before a justice of the peace, see acts of 1838-9 page 101-2 section 5th.

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Clay et al
v.
The State.

Penal statutes are to be strictly pursued and are strictly construed, and not extended beyond their express words and clear import 6 Bacon abridgement (Guelleam's edition) 390 and foward 2 Cowan reports 419 Sprague v Birdwell, 1 vol. Mo. reports 147, 89 Reddick and McNear v Gov. 5 Wheaton from 76 to 96 U. S. v Wethinger. It is an established rule that all acts in *Pari Materia* an to be taken together as if they were one law, 6 Bacon abridgement (Guelleam) 382 Douglass Reports 30.

If a latter part of a statute be repugnant to a former part thereof, it shall stand as far as repugnant to a repeal of the former part because it is the last will of the Legislature, 6 Bacon (Guellam) 373, and the title of a statute is no part of the statute 6 Bacon Abr. 369.

When a statute creating a new offence, gives a penalty and directs how it shall be recovered the offence cannot be punished in any other way than that directed by the statute, 6 Bacon Abr. 393 1 Bun Rept. 543, 4, 5 (Rex v Wrightclas, Cro. Jac. 643-4, Castles case.

If a statute creates a new offence and appoints a particular method of proceeding against offender, without mentioning an indictment, no indictment lies, because as the methods of proceeding are expressly mentioned that by indictment seems to be excluded by implication, 6 Bacon Abr. 393-4 1 Showers reports 398-9 400 401 (King v Manott when a new offence is created by statute and a special jurisdiction out of the course of the common law is prescribed it must be followed: 1st Showers reports 401-2 King v Manott Cowpers reports 524 (Hartley v Hooke,) and no statute shall be so construed as to be inconsistent or against reason, 6 Bacon Abr. 391.

It is a general rule that if an affirmative statute; which is introductive of a new law directing a thing to be done in a certain manner, that they shall not even although there are no

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negative words, be done in any other manner, 6 Bacon 377 3 mass reports 307 (Gedney v Inhabitants of Tuckly. A thing within the *intention* is within the statute, and a thing within the letter but not within the *intention* is not within the statute, 6 Bacon Abr. 384-5, 3 Cowans reports 89 Jackson v Collieris, subsequent Laws on the same subject matter repeals the former laws, Coxes digest 642, No 43-41-42 1 Gallis 150 114 Conn digest 643 No 55 1 Paine 400.

Brickey circuit Attorney.

1st. That both counts in the indictment are good in law, and a conviction may well be had on both or either (Arch. Crim. pl. 59.)

2. The law upon which the indictment was founded has not been repealed (27 sec. dig. 209) and the act passed at the last session page 101 giving justices of the peace jurisdiction of similar offences, does not repeal the first act as contended for by the appellant. I hold the rule of construction "to be this, if by a former law an offence is indictable at the quarter sessions and by a subsequent law the *same* offence be made indictable at the assizes, here the jurisdiction of the sessions is not taken away, both have a concurrent jurisdiction, and the offender may be tried at either unless the last act subjoins express negative words, as that the offence shall be triable at the assizes, *and no where else*" (1 Blk. Com. 89, 90, 3 Bac. Abr. 563.)

3. Several persons may be joined in the same indictment, so several offences committed by the same party may be joined in one indictment, (see digest page 483 section 15, also 3 Bac. Abr. 563, Arch Crim. pl. 59. According to these authorities it seems to me the offence charged was clearly indictable and within the jurisdiction of the circuit court, there being no negative words, or repealing clause, in the last act, the former stands, consequently the circuit court decided correctly in refusing to arrest the judgment and this court will now affirm it.

Opinion of the Court by McGirk Judge.

It appears by the record that at the July term of the circuit court, for the county of St. Francois, the grand jurors

for that county indicted Eleazur Clay, Robert Clay, Wm. Finch and E. G. Clay, for disturbing a religious congregation, assembled for public worship.

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Clay et al
v.
The State.

The second count charges and finds, that said persons did, at the same time, disturb the congregation, by committing an assault and battery on one Reed &c.

To this indictment the defendants pleaded not guilty, except Finch, who was not taken. At the November term of the court they were found guilty by the jury, and fined two dollars each. The defendants by counsel made a motion in arrest of judgment, which was overruled, they then appealed to this court. The error complained of here arises on the 6th reason in arrest of judgment, which is, that the circuit court had no jurisdiction of the offence, but that the jurisdiction belongs to a justice of the peace. One or two other errors were mentioned by the counsel but were not relied on, and I will take no notice of them, as there appears to be nothing in them.

In the year 1835 the general assembly passed a statute making it penal to disturb a religious congregation and making the offence punishable by indictment in the circuit court: R. Code page 209, sec. 27, at the last session of the Legislature 1839, p. 101. The legislature declares that from and after the passage of that act justices of the peace shall have jurisdiction of all cases of disturbance of religious worship, and may fine to the extent of ten dollars, and to commit to prison for non payment &c.

The counsel for the appellant, Clay, insists that the last act, giving the jurisdiction to justices of the peace, repeals the first act, which gives the jurisdiction to the circuit court the latter act being repugnant to the former act, to support this Mr. Scott cites, Coxes dig. 642 No. 41-42-43, 1 Gallis 150 114, Conn. dig. 643, No. 55, 1 Paine 400.

The counsel also argues that here the last act is repugnant to the former, and therefore repeals it, and cites for this, several authorities.

Mr. Brickey of counsel for the State admits the rules of law as above laid down to be correct, but then he insists that in this case the latter act is in no way repugnant to the

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v

The State

The act of
Feb. 13, 1839
(Laws of Mo.
session 1838-
9 p. 101)
giving jus-
tices of the
peace juris-
diction in ca-
ses of distur-
bance of reli-
gious congre-
gations, is in
aid of the 27
sec. of 8th
art. of the act
concerning
crimes and
punishments
(R. C. 1835,
p. 209) ma-
king the same
offence pun-
ishable in the
circuit court
by indictment
the jurisdic-
tion of the
circuit court
and justices
of the peace,
in such cases,
is concurrent.

former act, and that the rule is in such case, that where there are two or more statutes on the same subject they shall be so construed that all shall have effect if possible. To support this proposition the counsel cites 1 Bl. Com. p. 90 where it is said, that if two affirmative statutes be passed on the same subject, and the latter contains no repealing or negative words they may both stand, and Blackstone puts a case which is "that if by a former statute an offence be indictable at the quarter sessions, and a latter statute makes the same offence indictable at the assizes, the offender may be indicted at either, and that there is in that case a concurrent jurisdiction in the two courts.

In the case at bar it appears to the court that the case put by Blackstone is in point for the State. That here the two statutes are, as regards the offence nearly the same, with some slight variations, and that the offence is only made punishable before a justice of the peace *also*, and that the jurisdiction is concurrent; therefore whichever gets possession of the case first is rightfully entitled to try it.

This view is strengthened when we look at the title of the last act, which is *an act for the more effectual protection of public worship*, p. 101. This title shows that the statute was intended to be in aid of the former laws; and it is so, for when the offenders are only subject to the action of the circuit court time is given for them to runaway; but this gives power to any one to act while the offence is in *progress*, in a summary and prompt manner. The latter act does thus aid more effectually the protection of public worship. It is therefore my opinion that there is no error in the judgment of the circuit court, and that the same ought to be affirmed. The whole court being of the same opinion the same is affirmed.

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1. A person cannot acquire a lien upon land purchased by another, by the voluntary and unauthorized payment of the purchase money, as one man cannot make another his debtor by paying money for him, without being requested so to do by the latter.
2. A person who takes a conveyance of land with notice of the legal or equitable title of another to the same land will be held a trustee for the benefit of the other, and will not be permitted to avail himself of the statute of frauds, on the ground that the agreement under which he took the conveyance was not in writing.

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v

L. S. and D.
B. Callaway,6 605
115 640

Appeal in chancery from the Gasconade circuit court.

Frissell for Appellant.

1st. That a party to a bill for specific performance may admit a verbal contract to convey and still insist upon the statute of frauds as a bar to the performance. *Rowe vs Teed* 15 Vis. C. R. 371.

2d. That the statute in this case presents a complete bar to the prayer of the bill for a specific performance, there being no contract, other than verbal, between Truesdell and McCoy, or his assignees, the Callaway's. *Leman vs Whilby* 3 Cond. Eng. Ch. Rep. 736, Bacon's Ab'r. 120.

3rd. That the purchase money not having been paid to Pritchett, neither at the day or any other time, Pritchett might rightfully sell the land to another, and the purchaser would hold the land divested of any equity that McCoy or his assignees might have had against Pritchett. *Hatch vs. Cobb*, 4 J. C. Rep. 559. *Kempsal vs. Stone*, 5 J. C. R. 193.

4th, That time in this instance did constitute a part of the essence of the contract between McCoy and Pritchett, the value of the property contracted to be sold being constantly changing. *Dolout vs. Rothschild* 1 E. C. Rep. 302. *Parker vs. Frith* do. 100. *Benedict vs Lynch* 1 J. C. R. 369. *Newland on Contracts*, 224.

5th. That until the purchase money had been paid, or tendered, neither McCoy or Callaway could ask for a conveyance either from Pritchett or Truesdell in a court of equity, payment being by the contract a condition precedent.

6th. There being no allegations in the bill that McCoy had paid the purchase money to Truesdell, but there being an allegation that the same had been paid by McCoy to

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Truesdell v. B. Callaway, Pritchett, and the proof being clear that Truesdell had paid the purchase money to Pritchett, and there being no proof that McCoy had done so, the court erred in founding its decree upon the assumption that McCoy had paid the said money to Truesdell- 2 Maddox Chan. 438.

7th. That even admitting that the money had been paid, a court of equity could not decree a performance to be made by Truesdell for the want both of privity and mutuality.— Newland on Contracts, 152-3. 1 Chitty, see practice §27-8.

8th. If McCoy or his assignee have any remedy, notwithstanding their laches, it would be at law and against Pritchett. Hatch vs. Cobb, 4 J. C. Rep. 559.

9th. No proof could be legally admitted of any matter not at issue between the parties, and the matter of the payment by McCoy to Truesdell of the purchase money not being at issue, all proof tending to prove such payment must be excluded. 2 Maddox 438.

Brickey for Appellees.

1. That Truesdell acquired the title to the land in question as trustee, and as such was bound to convey to McCoy or his grantees the present complainants. If a man purchase land in the name of another and pays the money, it will be trust for him that paid the money, though there be no deed declaring the trust, for the statute of frauds does not extend to trusts raised by operation of law. A resulting trust, or trust by operation of law, remains as at common law, and susceptible of parol proof. 7 Bac. Abr. 142, letter c. and authorities there cited. 1 Johns cases 153, (Jackson vs. Sternberg,) 3 Johns Reps. 216, (Foot vs. Colvin.)

2nd. The parties having submitted this cause to the decision of the Judge as Chancellor, cannot now make objection to his decision. Therefore there is no error in the record or proceedings of the court below, and this court will affirm the decree of complainants.

Cole for Appellees.

1st. Truesdell obtained the title to McCoy's land mala fide, by false suggestions and a suppression of the truth, when there is fraud trust arises. 1 Cranch on real property, 485.

2nd. When the title was obtained from Caldwell, Truesdell made a public declaration of the trust to McCoy and that he had notice of McCoy's title.

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3rd. That there is a trust created by operation of law in favor of McCoy or his assignees. 11 Johns Rep. 95. 2 Story's Equity 438. 2 Fonb. Equity 116. Sugden on vendors 443 and 527.

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4th. The plea of the statute of frauds cannot avail defendant, under the facts and circumstances of this case. Story's Equity, 16. 441. 1 Cranch on real property 471.

5th. The defence in the answer, which alleges a contract of McCoy about a 60 feet way, is not proved, is without consideration, is wholly indefinite, void and against law.—When matters are set up in avoidance they must be proved. 2 Madd. ch'y 446, (Green vs. Hart,) 1 John Rep. 589.

6th. The defence in the answer which alleges the payment of a sum of money by Truesdell to Pritchett for McCoy cannot create an equity in behalf of Truesdell; because

1st. Truesdell paid the money to Pritchett without being requested to do so by McCoy.

2nd. The relation of vendor and purchaser does not exist between Truesdell and McCoy, and the complainants are not bound by the transaction, and are purchasers without notice.

3rd. Truesdell obtained the legal title to McCoy's land fraudulently and no equity can arise to him under the circumstances.

4th. From the facts of the case if Truesdell did ever pay money he must have been repaid.

5th. From the facts of the case Truesdell never did pay the money to Pritchett alleged in his answer and the allegation in this particular, as well as many others connected with it, are not proved. McKnight et al vs. Bright, 2 M. R. 110. Marsh vs. Turner et al, 4 Mo. Rep. 253.

7th. There is no error in the Chancellor in disregarding the issues in the cause, nor on finding the money repaid to Truesdell nor in the decree by him rendered in the cause.

Opinion of the Court by Tompkins Judge.
Judge McGirk absent during the remainder of the present term.

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Larkin S. Callaway and Daniel B. Callaway preferred their bill of complaint in the circuit court of Franklin county against William Truesdell, the appellant, and one Jesse Pritchett. The cause was transferred to the circuit court of Gasconade county, where a decree being made against Pritchett, for want of an answer, and against Truesdell, on a hearing, he appeals to this court.

The complainants in their bill state that they are the purchasers of a tract of land lying in said county of Franklin. That said tract of land was originally the property of one John Caldwell, who sold it, along with other land thereto adjoining, to said Pritchett, who sold the same to the defendant, Truesdell, to one William G. Owens, and to one Joseph McCoy, in separate parcels, giving to each a bond for a title to his respective part, whenever said Caldwell should make to said Pritchett a title to said tract of land; that the complainants purchased the interest of said McCoy; that Pritchett, when he sold the land, as aforesaid, to said Truesdell, Owens, and McCoy, put each of them into the possession of his respective parcel of land; that Pritchett had paid Caldwell for said land; and that Truesdell, Owens, and McCoy, had each paid Pritchett for the portion which each had respectively purchased from him, and each was entitled to a deed for his land, that is to say, Pritchett to a deed from Caldwell, and Truesdell, Owens and McCoy, from Pritchett. That when said Truesdell and Owens applied to Pritchett to make them a deed, by agreement among themselves, Pritchett surrendered to Caldwell his bond for the title to said land, and Caldwell, in consideration thereof, did convey the said land to Truesdell, and that Truesdell in consideration thereof undertook to convey to Owens and McCoy, respectively, their several portions of said tract of land, according to the effect of the bonds executed to them respectively, by Pritchett; that in some short time thereafter Truesdell informed McCoy of this arrangement, and requested him to pass the title bond made to him by Pritchett over to William G. Owens, in order to have a deed drawn agreeably to the terms of the bond, and that he Truesdell would execute it; that McCoy accordingly did deliver the title bond to said

Owens, who wrote the deed and delivered it to McCoy, but retained the bond; and that McCoy presented the deed to Truesdell for execution, and he refused to do it, but said he would execute any deed which would bind said McCoy and his heirs to keep open a way, sixty feet wide, through said land, on the bank of the Missouri river; that McCoy told Truesdell that his bond called for the Missouri river as a boundary, and that if he did not execute the deed as drawn up by Owens, he would resort to Pritchett on his bond; that Truesdell then told McCoy he had no bond, alluding to the fraudulent collusion betwixt Truesdell and Owens, by which said bond was retained in the possession of Owens, and McCoy kept out of his title. The bill further charges Truesdell with the act of procuring the deed for this land to be made by Caldwell to himself with intent to defraud McCoy; and further states, that neither McCoy nor the complainants have ever been able to recover the bond from Owens, and that they believe it is withheld by the contrivance of Truesdell; that said Owens is dead, and McCoy gone to parts unknown to the complainants; that they are unable to give the dates of the several transactions above stated, all of which are stated to be within the knowledge of Truesdell, and to have transpired within a few years. The boundaries of the land are there set out in the bill conformably, as is said, to the provisions in Pritchett's bond to McCoy. The bill prays a decree for a conveyance of the premises, and that Truesdell may be restrained from proceeding in ejectment against the complainants.

To this bill Truesdell pleads the statute of frauds; and answering says, that he did purchase of Pritchett a tract of land on the Missouri river, in Franklin county aforesaid, in the year 1832, the legal title of which he understood when he purchased to be in one John Caldwell; that Pritchett at the time made him his bond for a title, to be made so soon as he could get a title made to him by Caldwell; that the said bond was some years ago delivered up to said Pritchett, and he cannot be positive as to the wording thereof, but believes the above to be substantially correct; that some short time after said purchase he paid Pritchett the purchase mo-

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ney, and demanded a deed for the land. Pritchett answered that the legal title to the land was in Caldwell, who was bound to make him a deed. Pritchett then assigned to him his bond on said Caluwell for a tract of land including that purchased by him, Truesdell, from said Pritchett; that he understood at the time of the assignment of the said bond, and sometime before that one Wm. G. Owens and Joseph McCoy, had purchased or contracted to purchase from said Pritchett, the residue of the tract of land mentioned in said bond, which said Pritchett held on said Caldwell, after deducting the quantity purchased by him Truesdell, from Pritchett as aforesaid; that Caldwell did convey said land to him, and that he did say in the presence of Caldwell that he would convey to the said Owens and McCoy whatever portions of said land they were entitled to. The land conveyed is there set out by metes and bounds. The deed was made by Caldwell on the 25th day of February, 1833. He then states that shortly afterwards said Owens presented to him a deed to be executed by him; that he refused to execute the deed so presented by Owens, unless there should be inserted in said deed a covenant to keep open a way sixty feet wide along the Missouri river; and that he mentioned to said Owens, that the understanding between himself and said Owens and McCoy was that there was always to be an open way, sixty feet wide, on the Missouri river, on the land conveyed by said Caldwell to the said Truesdell as aforesaid. That said Owens then said such was the understanding, and that he would draw another deed and insert a covenant to keep open a way sixty feet wide on his portion of the land; that said Owens accordingly drew up another deed, inserting such covenant, which said deed said Truesdell executed. This deed he states was for about three acres, and executed on the 5th August, 1833, or thereabout; that he called on Pritchett to pay him for the land he had purchased; that before he called on Pritchett as aforesaid, said McCoy called on him, and mentioned to him that Pritchett held his note for his share of the land purchased by him from Pritchett, and that said note was due, and that said Pritchett was anxious for the payment of such note, and requested him to

ask Pritchett to take in part payment therefor a note on one Bryant for the sum of one hundred dollars; he then called on said Pritchett, and having settled his own business made Pritchett the offer of Bryant's note as McCoy had requested; that Pritchett refused to take it, and said if McCoy could not pay him he would take the land back, and that he, out of friendship for McCoy, paid Pritchett for him the sum of one hundred and twenty-five dollars principal, and seven dollars and thirty cents interest, that being the amount of the purchase money of McCoy's interest in the land; that he then took from Pritchett the note of the said McCoy for the money above mentioned, paid by him as aforesaid to said Pritchett, and called on the said McCoy and gave him the said note; that said McCoy then expressed his thanks to the defendant, Truesdell, for his friendship to him in paying said note, and requested him to reimburse himself in part by collecting from Bryant the amount of the note on said Bryant, handed to the defendant by said McCoy as aforesaid; that he Truesdell shortly afterwards called on said Bryant for the payment of said note, and he not being able to pay it, Truesdell returned it to McCoy, and that McCoy told him that he would soon make collections and pay him the amount paid by him to Pritchett; that at the time of these transactions; he had the most implicit confidence in the integrity of McCoy, and made use of no precautions to guard against any breach of good faith on the part of McCoy. All these matters were transacted some time previous to the execution of the deed from said Caldwell to him, Truesdell, and he further states, that he offered to execute to said McCoy a deed for his part of said tract of land, and to trust McCoy for the amount he owed him on account of money paid by him to Pritchett, as aforesaid, if McCoy could insert in the deed a covenant to keep open a way sixty feet wide on the Missouri river, through his part of the land, agreeably to the understanding between said Owens, McCoy and the defendant, Truesdell; that McCoy not acceding to this proposal, he refused to execute the deed; that then to his astonishment McCoy denied that he owed him any thing, and declared that he would get a title to the land out of him any

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how, thus betraying the confidence reposed in him for the payment of the sum of money which Truesdell, as he alleges, had paid to Pritchett for him; that McCoy had not yet repaid him the said sum of money.

The answer further denies all fraudulent combinations for the purpose of defrauding McCoy; and alleges that in good faith he acquired the title with intention to convey to McCoy whatever interest he might be entitled to in the land conveyed to the defendant by Caldwell, and that he is still willing to do so when McCoy shall repay to him the above mentioned sum of one hundred and twenty-five dollars principal, and seven dollars thirty seven and a half cents interest, paid by him as aforesaid to Pritchett for McCoy. The answer also denies all combination with Owens, and all other persons to secrete the bond made by Pritchett to McCoy for a title to the land, or that he, Truesdell, knows any thing of said bond or of its contents, and asserts that the agreement betwixt McCoy, Owens, and the defendant, Truesdell, was to take deeds from the defendant for their parts of said tracts of land, with a reservation of sixty feet on the Missouri river as an open way; and denies that he ever told any one that he withheld the execution of said deed from McCoy in order to make him relinquish a part of said land on the Missouri river.

The statute of frauds is again insisted on in the answer.

The complainants on their part gave in evidence a quit claim deed from McCoy for the premises.

John Caldwell, a witness for the complainants, testified, that he did convey a piece of land in Franklin county at a place called Washington, to William Truesdell, and that he understood from William Truesdell that Joseph McCoy had a claim on part of the land so conveyed by him, and that he was to convey the same to said McCoy agreeably to the conditional lines; that the land was so conveyed because they, Truesdell, Pritchett and McCoy, concluded that he, Caldwell, would not wish to make so many conveyances, as he understood from William Truesdell. The witness also stated that, to the best of his recollection, he understood from Pritchett that McCoy had paid a part or all for the land to

said Pritchett, he then stated the boundaries of McCoy's claim about which, as there is no contention, it is useless to notice it further.

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The witness being interrogated by Truesdell the defendant, stated that when Truesdell came to him for a conveyance he brought with him a bond on Pritchett, assigned to him the said Truesdell, for a tract of land which he Caldwell had sold to said Pritchett on the Missouri river, some months previous to the time he, Caldwell, deeded to Truesdell, (the punctuation and language of the bill of exceptions are obscure.) It is probable the witness said that when Truesdell came to get a deed executed that he brought along with him the bond made by Caldwell to Pritchett for a title to said land, and that this bond was assigned by Pritchett to Truesdell.

The wife of the witness Caldwell also gave evidence and testified, that Truesdell admitted his obligation to convey to McCoy, whose improvements were contained within the tract conveyed by her husband. The same witness stated, that Pritchett was owing her a trifle, and said he could not pay until he could see McCoy, who he said was owing him, and that he said as soon as he could go and see McCoy he wanted to pay her, and also to purchase a black girl: that when he went and saw McCoy, he sent for her to come and get her pay, and also bought a negro.

Otis Turner, another witness on the part of the complainants, testified, that some time in the month of September or October 1833, he was present at a settlement betwixt McCoy and Truesdell; that Truesdell had sent for McCoy to come to his house and bring with him all his papers, as he, Truesdell wished to have a final settlement with said McCoy; that McCoy came and brought his papers, and among them some notes on Truesdell, that he was present at the settlement, and that there appeared to be a question concerning some money which McCoy had paid Truesdell, which McCoy said could go in payment for a piece of land purchased from one William Miller, which Truesdell appeared not to understand, but at last admitted and settled in that way. This witness further testified, that he did not un-

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derstand that Truesdell had made any payment towards lands for McCoy, except what he *heard* paid Miller. But there appeared to be seven dollars due Pritchett for interest, which McCoy said he had paid, but would pay again, and did pay the same to Truesdell afterwards. This witness also stated that he heard a deed read, which Truesdell had written to *assign*, (sign) for McCoy, that McCoy refused to take it because it did not call for the waters edge, which McCoy said was his contract. That McCoy said he was willing to enter into a bond to leave a way sixty feet wide on the river, or more, if Truesdell and Owens would do the same, but that he wished the deed to call for the waters edge agreeably to contract: that at the time Truesdell offered to make McCoy this deed, he did not demand of McCoy any money as payment for this land. This witness also testified as to the boundary of McCoy's claim. At this settlement the witness states that Truesdell gave McCoy his note for about nineteen dollars, errors, and omissions excepted, at this settlement it was agreed that Truesdell should keep, for the interest due Pritchett, a gun of McCoy's which he had; this interest was about seven dollars, they could not ascertain exactly how much it was: that he heard no mention of land matters being due either way.

The same witness, on cross examination, stated, that he did not recollect of a receipt being brought forward on the day of the settlement, given Truesdell by Pritchett, for money paid him by Truesdell, amounting to \$125,00 principal, and thirty-seven and a half cents interest, which should have been paid Pritchett for McCoy by the said Truesdell, and that Truesdell *lifted* papers from McCoy, but does not recollect of McCoy *lifting* any from Truesdell at the above mentioned settlement.

Joseph McCoy testified that on or about the 1st of February, 1832, he purchased from Jesse Pritchett a tract of land lying on the Missouri river, containing about thirty-six acres; that he took Pritchett's bond for a title to the same, and gave Pritchett his obligation for the payment of the price.—Shortly afterwards, the witness states, that he paid Pritchett for this land, and took in his bond. About the same time

that the witness purchased he states that Truesdell also purchased from Pritchett about one hundred and eighty acres, a part of the same tract, and he also took Pritchett's bond for a title, as also did William G. Owens. It was called the Caldwell tract, because one Caldwell was the original owner and had sold to Pritchett. Caldwell had not yet made Pritchett a title to this land, when the witness, the said Truesdell and Owens, purchased: he further states that some short time after he had paid Pritchett for this land, Truesdell came to his house and told him that Caldwell had by consent of Pritchett and Owens conveyed to him the tract of land which Pritchett had bought of Caldwell, and also in parcels to the witness Owens and Truesdell, and that he Truesdell had undertaken to convey to the witness his part, and told him if he would give Pritchett's title bond to Owens to write a deed by, he would execute such deed at any time; that the witness delivered Pritchett's bond to Owens, and that Owens wrote the deed, which the witness presented to Truesdell who refused to execute it; Owens retained the title bond; Truesdell refused to execute the deed unless the witness would convey sixty feet in breadth on the river, through his tract of land lying on the river for the benefit of him Truesdell and Owens, for a landing and public highway. This the witness refused to do, but offered to leave a road if Truesdell and Owens would do the same. Truesdell did not agree to this proposal. The witness stated that he held Pritchett's bond for a deed, and would look to him for a title; that Truesdell then told the witness he had no bond, and that if he did not convey this sixty feet for the benefit of him and Owens he would never make a deed to the witness; that he then demanded his bond from Owens, who told him he had delivered it to Pritchett, and when he demanded it from Pritchett he told him he had burnt it. The witness then describes the land, and states his sale to the two Callaways. He denies that he ever did owe Truesdell anything, and declares that at the very time that Truesdell refused to make the deed, he and Truesdell had a final settlement, and that Truesdell *lifted* his notes with the exception of \$19,75 for which he gave his note to the witness. This set-

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tlement, he states, was made by O. Turner of Franklin county. After the settlement was made, Truesdell said he had paid seven dollars and some cents interest for the witness, and the witness recollecting that he had sold Truesdell a gun for eight dollars, this sum was by consent set off against the other; the witness denies that after the above mentioned settlement he has ever had any dealings with Truesdell.

It was agreed between the parties that the following facts should be evidence in the cause, viz: that a settlement of accounts between the parties took place on the 20th July 1833, and that Truesdell executed his note to McCoy for about \$19, this is the same settlement mentioned in Turner's deposition, that this note was afterwards sued on, and that Truesdell gave in evidence several items as an off set and had judgment for eight dollars.

The defendant Truesdell then gave in evidence on his part a paper purporting to be a receipt from Jesse Pritchett to said Truesdell for \$125 principal, and \$7,31 cents interest, dated 5th August 1832, which sum was received on a note held by me on Joseph McCoy, the said note having been given me for land sold to said McCoy on the river, in Franklin county, which land adjoins the land of the above named William Truesdell and W. G. Owens: this receipt purports to be signed by Pritchett.

Nathaniel Bell, a witness on the part of the defendant, testified that in a conversation betwixt himself and said McCoy in the subject of the sale of this property to Daniel B. and Larkin S. Callaway, he asked McCoy what he would do concerning the river part that William Truesdell claimed, and that McCoy answered that he was to give them three hundred dollars in property, viz: in hogs, cattle, corn, wheat, and household furniture, &c., to pay said Truesdell for the above mentioned land, and that they might get the title from the said Truesdell in any way they could, that he did not care if the Callaways got the title for fifty dollars.

Daniel Waldo on the part of the defendant, testified that in August or September 1832 he saw William Truesdell pay a note which said Pritchett held on Joseph McCoy, this

note was for upwards of one hundred dollars and was given for a tract of land described as the land in controversy, that the payment was made at the house of Pritchett, that McCoy then lived in St. Louis county, and he heard Pritchett say that McCoy had disappointed him and he would be glad to take the land back.

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The defendant having produced seven witnesses to prove that McCoy was not to be believed on his oath, closed his case.

On this testimony the circuit court found that McCoy had repaid to Truesdell the money which he had paid to Pritchett for him, and decreed that Truesdell be enjoined from proceeding in his action of ejectment against the complainants, and also decreed that he should convey to them that part of the land conveyed to him by Caldwell, which Pritchett had by his bond covenanted to convey to McCoy.

These were the points substantially made by the defendants counsel.

1st. That the purchase money not having been paid by McCoy to Pritchett, either on the day it became due or at any other time, Pritchett might lawfully sell the land to another, and the purchaser would hold it divested of any equity which McCoy, or his assignee's might have against Pritchett.

2nd. That the statute of frauds is a complete bar to the prayer of the bill for a specific performance, there being no contract other than verbal betwixt Truesdell and McCoy or his assignees, the complainants in this bill.

The evidence on the part of the appellant, Truesdell, that he paid the consideration for this land in controversy is the receipt of Pritchett for the money, and the testimony of Waldo that he saw Truesdell in August 1832, pay to Pritchett, at the house of Pritchett, this note of McCoy made by him to Pritchett. This is of so equivocal a character, that it scarcely deserves consideration. In the first place there is not the slightest evidence that McCoy ever requested him to pay it, or that he even ever promised after the pretended payment to repay Truesdell this money, which, if it ever were paid by him to Pritchett, he could not recover even in an ac-

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A person cannot acquire a lien upon land purchased by another, by the voluntary and unauthorized payment of the purchase money, as one man cannot make another his debtor by paying money for him, without being requested so to do by the latter.

tion of assumpsit, without such promise. It is well settled law that one man cannot make another his debtor, by paying money for him, without being requested to do it. For, say all the books, if this were permitted, and A owed a sum of money to a friend, and an enemy chose to pay that debt the latter, (the enemy,) might convert himself into A's creditor nolens volens, see Selwin's nisi prius, title assumpsit; and the authorities there cited.

But the acts proved to have been done, are such very slight evidence of payment, that they scarcely deserve consideration. It certainly was no very difficult matter for Pritchett to write Truesdell a receipt for the money McCoy owed him, and as little trouble for Truesdell to count out to Pritchett in Waldo's presence the amount of the principal and interest due on McCoy's note. There is not the slightest evidence that this receipt ever came to the hands of McCoy. And the only evidence that the note ever came into his hands is the declaration of Truesdell himself, which it cannot surely be pretended ought to be listened to in a court house, not being given in answer to any matter stated in the bill. It is quite incredible that any man who is suffered to be his own guardian would be so silly, had he paid the money as Truesdell pretends to have done, as to content himself with such equivocal evidence of the fact, as a receipt of Pritchett. It makes the matter appear worse, too, that Pritchett, the only person capable of explaining these equivocal acts, was made a party to this bill, and has not answered, and denied the payment by McCoy. But John Caldwell states in his deposition, that to the best of his recollection Pritchett told him that McCoy had paid "*a part or all for the land to said Pritchett.*" Polly Caldwell, the wife of John Caldwell, vendor of this land, also states circumstances strongly conducing to prove the payment to Pritchett by McCoy of all his demand. She said that Pritchett owed her a trifle and could not pay her till he saw McCoy and that he said as soon as he could go and see McCoy he wanted to pay her and to buy a black girl; and when he went and saw McCoy he sent for her, and paid her, and bought a negro. But if it were established as a certainty that the

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money had been paid by Truesdell to Pritchett, still the evidence of Turner is sufficient to raise the presumption that it had been repaid to Truesdell before the institution of this suit, or before that settlement. Turner states that the settlement took place in October 1833. It is admitted on record that this settlement took place in July 1833, and that Truesdell then executed his note to McCoy for \$19 00. This settlement, Turner states, was denied by Truesdell to be final; that McCoy produced several of Truesdell's notes, which he Truesdell *lifted*, as the witnesses expresses it. In several places I have copied the testimony as I found it, not being very certain whether I could render the meaning in more intelligible language, or whether even I understood it. But Turner says that on that day, though he appears to have acted as accountant, he did not learn that Truesdell made any payment towards lands for McCoy, except what he *heard* paid to Miller; and this was the day on which Truesdell tendered the deed too.

But on the cross examination by Truesdell, Turner tells "that he does not recollect of a receipt being brought forward on the day of the settlement, given Truesdell by Pritchett for money paid him by Truesdell, amounting to one hundred and twenty-five dollars principal, and seven dollars and thirty-seven and a half cents interest, which should have been paid Pritchett for McCoy by the said Truesdell." This is a literal copy, made so lest injustice should be done the defendant. This receipt must be that spread upon the record by the defendant, appellant here, as evidence that he had paid this money to Pritchett for McCoy. It can hardly be conceived to be possible that he who had called on McCoy for a final settlement on that day when the title to the land was to have been made, and when McCoy refused the deed, could have forgotten so large an item in his account. He might by possibility have been simple enough to have given, as he pretends in his answer, the note over to McCoy, and to have reserved this receipt as evidence of what he pretends to have paid for McCoy. But on such an occasion, when he fell in debt too to McCoy, this receipt could not have been forgotten. The conclusion then, to

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which I am irresistibly drawn is this—that if he then had that receipt, he was ashamed to produce such evidence; and that it would not have been produced here but for the hope that in the mass of rubbish with which this record is loaded, it would pass without scrutiny. But the dates sufficiently show that he had no such receipt at the time, frivolous and cheap as the evidence is. By the agreed evidence spread on the record the parties have fixed the date of this settlement to the 20th July 1833, and Turner too in the latter part of his deposition fixes the date to the same point of time; and Waldo, who testified to the gratuitous payment of McCoy's note, states that it was in the month of August or September that he saw the alleged payment made. The receipt then was an afterthought. Indeed the pretended receipt is dated on the 5th day of August. With this testimony before it, the circuit court, as it appears to me, must have been very charitable to Truesdell to find only that McCoy had repaid him what he had paid to Pritchett for him. The testimony was in my opinion amply sufficient to justify that court in finding that Truesdell did not pay any thing to Pritchett for McCoy. In his answer, too, Truesdell fixes the date of this payment pretended to be made to Pritchett on the 5th day August, when sixteen days before he had made a deed to Owens under this conveyance from Caldwell, and had tendered one to McCoy on condition of McCoy's leaving in him the title to sixty feet of ground on the river. No difficulties were then raised either by him or Pritchett, because McCoy had not paid, nor had Truesdell yet extended his friendship to McCoy. Pritchett might well be ashamed to answer such a bill if he had executed the receipt purporting to be made by him. But admit that Truesdell paid this money as he states, out of friendship, and that McCoy afterwards recognized the act as his own, and promised to pay (of which there is no evidence, but the gratuitous declaration of Truesdell, which his counsel seem to have regarded as testimony in the cause,) he gains nothing by it here. The act gives him no lien on the land; nor could he in such case make it a lien but by making out a proper case in a bill filed for such purpose.

He says, in the second place, that this promise to convey to McCoy was verbal, and relies on the statute of frauds. It does not appear in evidence that the bond of Pritchett to McCoy was recorded, but Truesdell had actual notice of it, and by the 31st and 32d section of the act to regulate conveyances of land, found on page 123 of the digest of 1835; that is sufficient to divest him of all pretensions to any right either in law or equity. But the justice of mankind has stamped such acts with disgrace before the statute was made. See Story's Equity Jurisprudence, vol. 1st, page 383, section 395. But without resorting to the evidence of McCoy at all, who declares that he paid the purchase money to Pritchett, the testimony of John Caldwell and his wife raise a very strong presumption that McCoy had paid Pritchett the purchase money. If any further evidence were required as against Truesdell, his unadvised and gratuitous declarations made in his answer, so inconsistent with the date of his receipt, would furnish that evidence. But Pritchett, it is evident admitted that he had received pay; he admitted it by his act in directing Caldwell to convey to Truesdell, that he might convey to McCoy; and Truesdell, when on 20th July 1833, he made a deed to Owens, and tendered one to McCoy, admitted that he had no authority from Pritchett to withhold the title from McCoy. His own answer, the date of his receipt, and Waldo's testimony, all show that it was not till the 5th August that he thought of retaining the title of this land, under pretence that McCoy had not paid Pritchett. But Pritchett, by failing to answer this bill, has admitted that he has received the price of his land, and it is difficult for me to conceive how Truesdell becomes authorized to complain of McCoy's tardiness in paying him. He does not pretend that he purchased the bond of Caldwell from Pritchett; but only that as agent for McCoy he paid Pritchett McCoy's debt. In every view I have taken of the subject, the decree of the circuit court is in my opinion correct.

1st, If Truesdell paid the money, and it has not been repaid, he has thereby acquired no lien on the land, and has even lost his money, unless he can prove either a previous request by McCoy, or a subsequent promise to pay.

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A person who takes a conveyance of land with notice of the legal or equitable title of another to the same land will be held a trustee for the benefit of the other, and will not be permitted to avail himself of the statute of frauds, on the ground that the agreement under which he took the conveyance was not in writing.

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2d. If he had paid at the time he pretended before Caldwell was directed by Pritchett to convey to him for the purpose of conveying to McCoy the settlement in Turners presence shows that he was then indebted to McCoy, and consequently that the money must have been repaid as the circuit court found. If he paid the money after Caldwell conveyed to him, the act was unauthorized and unnecessary, as admitted by the acts both of Pritchett and of Truesdell himself; for on the 25th day of February 1833 he says Caldwell conveyed to him by order of Pritchett and he acknowledged his obligation to them to convey to McCoy by Pritchett's order, and in pursuance of that admitted duty on the 20th day of July of that year he tendered a deed to McCoy; and it was not till the 5th of August then next that the pretence was found for retaining in himself the title to McCoy's portion of the land. This in my opinion amounts to a plain proof that there was no truth in the charge that McCoy had not paid Pritchett, and if he had not paid him, it was no part of Truesdell's duty to withhold his title to the land.

But some reliance it seems in the argument of the cause was had on the testimony of the witness introduced to establish an admission on the part of McCoy that Truesdell, had paid Pritchett for McCoy's land. This testimony has been before stated in part. He says that some time in the last of April or first of May 1835 McCoy sent for him (told him,) that he had sold the land to the Callaways provided they could raise the money, that in case they could not, he promised the witness to let him have it; the price was according to him \$1500. The witness then asked him what he would do about the river part that William Truesdell claimed, and McCoy informed him that he was to give the Callaways three hundred dollars in property viz: hogs, cattle, corn, wheat, household furniture &c. &c., to pay the said William Truesdell for the above mentioned land, and that they might get the title from Truesdell in any way they could, and that he McCoy did not care if they got the title for fifty dollars, and the witness states that he afterwards saw such property of McCoy in possession of the Callaways.

In order to make out the case the counsel require us to

believe that this answer was not given to this question because it seems to answer as to the whole land, whereas the question related to a part only, and consequently that the proper question to which this answer was given, related to the whole tract, and that a part of the testimony was omitted in the record. Now had this been the case it is to be considered that it was his duty before the cause was argued to see that the record was complete, and if not, to apply to this court to have it made so, and not tax the credulity of the court so far as to suppose that both the counsel and clerk had neglected their duty; this duty too to see that the record is complete is the more imperative on the counsel as he claims to be benefited by the part alleged to be omitted. It is in vain to spread out the testimony of a cause on the bill of exceptions if we are required to suppose for, the benefit of the appellant what he has been too idle to preserve. But I consider the answer pertinent enough. It alludes expressly to the land concerning which the question was put (i e) the aforesaid land. But then it was passing strange that McCoy should be giving money to the purchasers to pay for the part claimed by Truesdell, while he was receiving money from the same persons. There is no evidence that he was to give money to the Callaways. He was to give them property and such property as might reasonably be supposed to be very useful to them, the purchasers of the land, and very troublesome to McCoy, who it abundantly appears by evidence in the record, removed to distant parts, while it equally appears that the purchasers resided, on the premises. The deposition of this witness was taken two years after this conversation, and his memory appears to be not very accurate; he states the price demanded by McCoy for the land to be three times as much as it appears by the deed of McCoy to the Callaways it was sold for. If we reduce the price which he states that McCoy said he was to give the purchasers for the river part claimed by Truesdell in the same proportion we shall have the sum of one hundred dollars, a very small sum indeed to compensate the purchaser for the trouble of prosecuting a law suit with so troublesome a man as Truesdell has shown him-

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self on this record to be; off the record none of them are known to me. By seven witnesses evidence is given that McCoy is not to be believed on oath. Yet his testimony is corroborated by that of Caldwell and wife, as well as that of Turner. Truesdell furnishes himself testimony enough to satisfy me, that he sets up in this case the most unfounded pretensions to hold McCoys property, still more unfounded is his pretence to the right of compelling McCoy to keep open the way on the river. He states and perhaps proves that Owens accepted a deed with such provision, but offers no evidence to show any obligation on the part of McCoy to do the same or any understanding between McCoy and Owens on that subject. For the reasons above given I am of opinion that the Judgment of the circuit court ought to be affirmed, and Judge Napton also believing it ought to be affirmed, it is accordingly affirmed.

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1. A right of way, *from necessity*, from one part of the claimants land to another part of the same tract, over the land of another, cannot exist.
2. Where the declaration in trespass contains two counts, one under the statute, and the other at common law, and the verdict is general, the court will presume that the verdict is for single damages only.

Appeal from the Franklin circuit court.

Prissell for Appellant.

1st. That the court erred in permitting testimony to go to the jury respecting the number of times the fence had been thrown down, that not being a matter in issue.

2nd. That the court erred in permitting a witness to express his opinion on the comparative practicability of making a road down two different bluffs, the said witness not being an engineer.

3rd. That the court erred in refusing the 4th instruction prayed for by the appellant, 3 Kent Comm. 419 424 *Horton v Treason* 8 T. R. 50.

4th. That the court erred in refusing the 7th instruction prayed for by the appellant.

5th. That the court erred in giving the third instruction prayed for by the appellee, 3 Kent 422, O. Fallon v Dagget and Price 4 Mo. Rep. 346, as to the last reservation.

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6th. That the Court erred in rendering Judgment upon the verdict of the jury in this case, the damages being entire, and the finding being upon counts on which both single and double damages must be assessed, Withington v Young 4 Mo. R. 564, Lowell v Lewis 1 Mason Cox dig. 232.

7th. That the jury should have found the issues joined upon the special pleas, and, in case of finding for the plaintiff, the damages should have been subsequently assessed by another.

Polk for Appellee.

1st. The court ruled rightly in allowing proof to go to the jury of the number of times defendant threw down plaintiff's fence.

2nd. That the court committed no error in permitting plaintiff to prove that defendant had said, a road could be made down the bluff at his mill by a couple of hands in two or three months, and that the bluff at the mill was not higher or more difficult than that along defendants land, round which the way of necessity is claimed.

3. That the court did right in refusing to give the fourth and seventh instructions asked by defendant.

4th. That the court did right in giving the instructions prayed for by the plaintiff's counsel.

5. That the second motion for a new trial was properly overruled by the court.

6. That the motion in arrest of judgment was properly overruled by the court.

Opinion of the Court by Napton Judge.

Maupin the appellee sued Cooper in the Franklin Circuit court in an action of trespass quare clausum fregit. The declaration contains three counts. The first count charged, that defendant on a day specified, and on divers other days from that day until the commencement of this suit, broke

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and entered into a certain close of plaintiff (describing it) and then and there prostrated the fence of plaintiff, of great value, to wit: fifty dollars, and trampled down corn, wheat, oats and grass to the value of ten dollars, and with his cattle depastured and eat up the corn, oats &c. of said plaintiff to the value of ten dollars; and then and there prostrated and cut down the trees of plaintiff, and then and there dug up the soil, and also took and converted to his own use the fence, rails and timber, and wood, of the value of ten dollars, and other wrongs did by means whereof &c.

The second count is founded on the 2d, section of the act entitled an act to prevent certain trespasses, approved Feb. 25 1835, (Rev. Co. of 35 p. 612) and the third count is framed upon the same section.

To this declaration defendant pleaded; 1, general issue; 2, leave and license; 3, a right of way by necessity, and that the acts complained of were only such as were necessary to a proper enjoyment of such right of way; 4th, agreement by plaintiff with defendant in consideration of certain work, labour, and materials, furnished by latter to the former, by which the former granted to the latter, his heirs and assigns, a right of way over plaintiff's close, from a certain highway in Franklin county to the close of defendant, and that the acts complained of were done in the proper use of said way.

Issues were taken on these pleas, the parties went to trial, and a verdict was given to Maupin for \$175,00, which on motion was set aside and a new trial granted. At the June term 1839, defendant withdrew his plea of the general issue, and a trial was had on the remaining issues. The jury found each of the issues for the plaintiff, and assessed his damages to one hundred and fifty dollars; judgment was given for the damages aforesaid and costs. The defendant, moved for a new trial; because the verdict was against law and evidence; because the court misinstructed the Jury; because the court refused proper testimony and admitted improper testimony, and the damages were excessive. A motion was also made in arrest of judgment, because general damages had been assessed by the jury upon a general finding, and under the common law count the damages were

single, and under the statutory count treble damages were recoverable. Both these motions were overruled.

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From the bill of exceptions the following facts may be considered beyond dispute. Leah Maupin in 1825 conveyed by deed to Cooper the land on which he resided at the institution of this suit, being a part of her entire tract. In 1830, she conveyed the remainder to Maupin. From the plat of the land exhibited on the record, it seems that the bluff of the Missouri river separated that part of Coopers land on which his house was located from a field which he cultivated in the bottom, and this bluff, which was steep, extended through his entire tract; both Cooper and Maupin lived on the bluff, and had fields in the bottom; near the dividing line between Cooper and Maupin was a ravine, along which Cooper and Maupin had by their joint labour constructed a road to their fields in the bottom. This road was on Maupins land. Cooper could get to his bottom field by another road leading through the land of Mr. Williams, which was somewhat further than the road through Maupins land. About the last of March 1838, Maupin fenced up the road with a good fence, staked and ridered, which Cooper threw down whenever he had occasion to pass the road. One witness testified that the fence was thrown down by Cooper thirty three times, and other witnesses testified to sixteen times, other than those spoken of by the first witness. This testimony in relation to the number of trespasses, was objected to by defendant, but admitted by the court. A witness also testified, that at the foot of another bluff, where Cooper had another piece of land, Cooper had been building a mill, and he (witness) had heard Cooper say, that he could make a road to the top of the bluff, where his mill was, at the expense of two or three months work, with a couple of hands, and witness thought that the bluff at the mill was as bad as the bluff at Coopers field. This testimony was also objected to by the defendant, but was allowed to go to the jury.

The defendant moved for the following instructions:

1. That Leah Maupin in conveying to Cooper the land specified in the deed bearing date Nov. 24th 1825, convey-

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ed to him all privileges she there possessed in other adjoining lands necessary for Coopers complete enjoyment of the land by said deed.

2. That the conveyance of the land, adjoining that already conveyed to Cooper, to the plaintiff Maupin, vested in Maupin the said land, subject to the rights and easements of Cooper in that land.

3. That if the jury believe from the evidence that both Maupin and Cooper claimed under Leah Maupin, and that the conveyance to Cooper was prior to the conveyance to Maupin, and that the way in question over a part of the land of Maupin was necessary to Cooper for the enjoyment of the land conveyed to him by Leah Maupin, they must find for the defendant.

4. That if the jury believe from the evidence that the way in question is a way of necessity for Cooper to enjoy his own land, they must find for the defendant.

5. That if the jury believe from the evidence that the laying down the fences, and other acts complained of in the 2nd and 3rd counts, were necessary for Cooper to do, in order to go to his own close, they must find for the defendant on the said two counts.

6. That if the jury believe that the way, out of which the fences were thrown, was made by Maupin and Cooper in partnership, and for their joint use, and that Cooper was in possession of said way, as far as such property is susceptible of possession, with the consent of the plaintiff, the action of trespass does not lie.

7. That if the jury believe from the evidence that Maupin offered to pay Cooper for the way, it was an acknowledgment of Cooper's right to use the way, and the action of trespass does not lie.

All of which instructions except the 4th and 7th the court gave. At the instance of the plaintiff the court also gave the following instructions.

1. On the issue made upon the second plea the jury must find for the plaintiff, unless they believe from the evidence that the acts alleged in the declaration as trespasses were committed by defendant on a way leading from a certain

public highway in Franklin county to the close of defendant, and that the defendant had no other way from said highway to said defendants close mentioned, than that on which said acts were committed, and that said acts were only such as were necessary to be done in passing said way.

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2. On the issue made upon the third plea, the jury must find for the plaintiff, unless they believe from the evidence, that before committing the acts attempted to be justified in said plea, there was an agreement made between owner of close of plaintiff and owner of close of defendant, in consideration of certain work and labor, &c., as alleged in said plea, by which the former granted to the latter and his assigns, a certain way from the public highway to the defendants close, over plaintiffs close, and that the said acts were committed in passing on said way, so granted as aforesaid, and were only such as were necessary in so passing, and even if the jury shall find the justification alleged in the fourth plea to be true, it does not bar the plaintiff from recovering on 2d and 3d counts of the declaration.

3. That the defendant can have no right of way by necessity over the land of the plaintiff to any other portion of the same entire tract of defendant's land.

The errors insisted on in this court are;

1st. The admission of improper testimony;

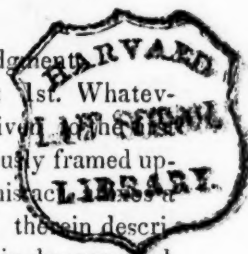
2nd. Erroneous instructions given and proper ones refused.

3rd. Refusal to grant a new trial, and

4th. Refusal of the court to arrest the judgment.

I will examine these points in their order: 1st. Whatever may be the proper constructions to be given to the first count, the second and third counts are obviously framed upon the statute, and the second section of this act imposes a penalty of five dollars for every trespass therein described. The declaration alleged that on a certain day specified, and on various other days between the days specified and the time of bringing this suit, the defendant committed certain trespasses.

In order that the jury should know the amount of damage sustained, it was therefore proper that the number of trespasses should be given in evidence. The withdrawal of



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the general issue could not deprive the plaintiff of this right, for the special pleas of justification admitted every thing charged in the declaration, and the plaintiff had a right to submit such proof to the jury, as, in the event of their negating the pleas, would enable them to ascertain the amount of damage done, on any other supposition a writ of enquiry would be necessary in every case where special defences were set up; this would be a very inconvenient practice, and no precedent has been cited to sustain it.

It is also objected, that the court suffered certain admissions of the defendant in relation to the practicability and cost of constructing a road over a certain bluff on the river, where the defendant had a saw mill, to go to the jury, with a view to negative the idea of a way from necessity. This admission was collateral, but connected with the statement of the witness in relation to the comparative steepness of that bluff, and the one running through defendants land, over which no road, as defendant contended, could be made; it was legitimate proof to sustain the plaintiff's case. The only objection urged to this collateral admission, in this court, is, that the witness who gave his opinion about the comparative heights of the two bluffs was not an engineer, I should suppose that it did not require the eye of an engineer to form a tolerably correct judgment of the comparative height and steepness of the two bluffs, for any purpose contemplated by either of these parties. If what the witness detailed had been a mere matter of opinion, the particular skill and judgment which he possessed ought to have been shown, before his opinion could have gone to the jury. But, instead of stating what he supposed to be the height and steepness of each bluff, and leaving the jury to make the comparison for themselves, which would in general be the most correct mode of testifying, he stated what amounted to the same thing, that each bluff was about the same height, and about equally impassable. This objection therefore seems to me rather captious.

2nd. The court refused to give the fourth and seventh instructions asked by the defendant. The fourth instruction was properly refused, because it did not leave to the jury to

determine whether the trespasses complained of were committed in the proper use of the way or not. The seventh instruction contained an assumption that an offer on the part of Maupin to pay Cooper was an acknowledgment of Cooper's right to use the way, and was for that reason properly refused.

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The first and second instructions given by the court for the *plaintiff*, seem to be unexceptionable. The third instruction, however, involves a more difficult and important question, the determination of which must settle the rights of the parties in this suit.

What constitutes a way by necessity, is not very well agreed on among law writers. Serg. Williams (1 Saun. 323, n. 6,) is of opinion that there is no such thing as a right of way by necessity, except where it is plead by way of *prescription* or *grant*. To plead a way by necessity in general terms will not answer, Bullard vs. Harrison (4 M. & S. 387.) Where there was once a unity of possession, as in the case at bar, it must be plead as a way by grant, and as a *non existing* grant; Chancellor Kent, (3 Kent. Com. 341,) after reviewing the authorities, says that Sergeant Williams' doctrine is a sound one, "that it places the right upon a reasonable foundation, and one consistent with the general principles of law." Chancellor Kent is also of opinion that the cases of Dutton vs. Taylor, (2 Suttan R. 1487,) and Buckby vs. Coles, (5 Taun. 311,) established the doctrine, that a right of way may exist, by necessity, even over the land which the claimant of the way had previously sold. This is upon an implied reservation in the grant. The annotator on Saunders (1 Wm's Saunders 323, a, note h,) says the case of Buckby vs. Coles is not very intelligible, and indeed it has been expressly overruled by Bullard vs. Harrison, (4 M. & S. 387,) so far as allowed a general plea of necessity.

In Packer vs. Welsted (2 Sid R. 39, cited 2 Kent 380,) A had three parcels of land, and there was a way from the first to the second, and from the second to the third; B purchased all, and then sold the two first to C. It was held

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that B, still, notwithstanding his deed, had his way through the other two parcels.

The general principle to be drawn from these cases is, that where there are three parcels of land, and the owner of all three sells the middle one, he himself or, his assignees, or purchasers still retain a right of way through the middle parcel, there being no other way to get to the remaining land or third parcel, except by trespassing on their neighbor's land, and this is called a necessity. It seems to be both a legal and physical necessity.

The case of Pernam vs. Weed, (2 Mass. R. 203,) recognized the correctness of this principle, and that this right of way not only could exist when implied from a grant, but when a part of a man's land is taken from him against his will, as by an *extent*. But the court said it must be a way of *necessity*, not of *convenience*.

The case of Gayetty vs. Bethune (14 Mass. Rep. 49,) is in point. The court examined all the points on which the right of way was claimed. They declared it could not exist by grant, because there was no *adverse possession*, or if so, it had not continued for twenty years. As to a way from necessity, they say "This right depending upon necessity exists only when the person claiming it has no other means of passing from his estate into the public street or road. In the case before us, there is an avenue, and one which was provided when the house was built, leading from the street to the land in the rear of the house, *besides which the house abutts on the street or square, so that the plaintiff may open a passage*, if he has not one already. A right like this is to be construed strictly. In Temnan vs. Creed, the plaintiff had no other way to get from his land to the public street, and the front land had been taken from him *invito* by his creditors. In other cases where a man has granted land surrounded by his own which he retains, he is supposed tacitly to have granted a right of way. upon a well known principle that when a man grants any thing, he is held to have granted every thing necessary to the use and enjoyment of the thing granted. *It may well be doubted* if a man voluntarily takes a conveyance of land, surrounded on all

sides by the lands of his grantor and others, he can enforce this right of way under a plea of necessity, against any one but him who conveyed to him. Now in the present case the plaintiff must be held to have voluntarily purchased, knowing the situation of the estate; and if he had no access to the back part of it but over the lands of another, it was his own folly.

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1840.

Cooper
v
Maupin

It will be observed, 1st, That the passage spoken of by the court as leading to the street from the yard of the plaintiff, was merely a four foot passage, and of course did not answer for wagons, &c. 2, The court say no necessity existed, because the plaintiff could pull down his house or wall, and in that way make a passage if he thought proper. 3, The court obviously question the doctrine laid down in Kent and in Buckby vs. Coles, that a man taking a conveyance can claim a way of necessity from any one but the grantor. The authority, then, of the cases of Dutton vs. Taylor, (2 Lutthw. R. 1487,) Packer vs. Welsted, (2 Sid. R. 39,) and Buckby vs. Coles, (3 Taun.) is at least questionable, and has been doubted by Serg. Williams, and the supreme court of Massachusetts, in Gayetty vs. Bethune. Admitting them to be the settled law, I see no reasons for carrying the principles farther. No case has yet sustained a right of way from necessity from one part of the claimants land to another part of the same contiguous tract over the land of another. How can such a way be called a way of necessity? It may be convenient, but I understand the necessity must be absolute, and created by the intervention of another's land. In Gayetty vs. Bethune, the court declared there was no necessity, because the plaintiff could have torn down his brick wall. A proceeding I should suppose as troublesome and expensive as cutting down a bluff.

A right of way, from necessity, from one part of the claimants land to another part of the same tract, over the land of another, cannot exist.

The case of McDonald vs. Lindall (3 Rawle's Pac. R. 492, 8 Wheeler Am. C. L. p 388,) sustains this position. The court held that a right of way from necessity extends to a single way. "It is always," say the court, "from strict necessity, and the necessity cannot be created by the party claiming the right. *It never exists when a man can get to his property through his own land, however inconvenient the way through his own land may be.*"

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The court did not in my opinion err in instructing the jury "that the defendant can have no right of way by necessity over the land of plaintiff to any other portion of the same entire tract of defendants land."

Third. The refusal of the court to grant a second new trial, is also assigned for error. The second section of the 7th art. of the act concerning practice at law, provides that only one new trial shall be allowed to either party except where the triers of the fact shall have erred in a matter of law, or the jury shall be guilty of misbehavior, neither of these reasons existed in the case. No pretence was made that the jury had misbehaved, nor any that the jury had misconstrued the law as expounded to them by the circuit court; whether the court mistook the law or not, is another matter, and has been examined in investigating the second point.

Where the declaration in trespass contains two counts, one under the statute, and the other at common law, and the verdict is general, the court will presume that the verdict is for single damages only.

Fourth. The first count in the declaration is supposed by defendants counsel to be a common law count, though concluding *contra formam statuti*, and being joined with the statutory counts, and the verdict a general one, judgment should have been arrested. When the verdict of the jury does not specify that double damages were found, I apprehend the presumption is that such verdict is only for single damages, and it is the province of the court to double or treble the damages. But if the party complaining chooses to take, as in this case, single damages only, the defendant has no right to complain. The verdict then being for single damages, would be good either under the common law count if such was the character of the first count, or the statutory counts. There was no cause, therefore, why it should be arrested. Judgment affirmed.

MILAM and others v. BRUFFEE Adm'r. of BRUFFEE and
others.SEPT. TERM
1840.

1. On a judgment obtained under the provisions of the act of 19th Dec. 1821 (R. C. 1825, p. 195,) concerning "buildings," the execution can only issue against such property, charged with the lien, as the defendant owned or possessed at the time of the commencement of the suit.
2. In proceedings under the act concerning "mortgages," all persons having an interest in the mortgaged property may join in the petition for the foreclosure and sale of the same. The proceedings under this act more resemble those of a court of equity, than those of a common law court.

Milam and
others
v
Bruffee adm'r
of Bruffee.

Error to the Circuit Court of Washington County.

Frissell for plaintiff in Error.

That a judgment on account filed under the law regulating builders liens, is only a lien from the time of its rendition, and is a general lien upon all the real estate of the defendant situate in the county when the judgment is rendered unless the plaintiff in the action issues a sci. fa. according to the provisions of the statute and thereby renders his lien specific as to the building and the five hundred square feet subject to the builders lien under the statute, Stat. of 1823 page 193 sec. 3 and 4 and 9. That a sci. fa. is necessary in all cases when the builders lien is to be enforced, acts of 1825, p. 194, sec. 1, 3 and 4.

Brickey for defendant in Error.

1. Can the plaintiffs sustain this action upon the facts and circumstances set forth in their petition? I conceive not for the following reasons. 1, Because Bruffee the mortgager had no legal right or title to the premises in question at the time of the execution of the mortgage.

2. Because the lien raised by John Howe as a mechanic and builder, and for materials found in building a house upon the lot prior to the mortgage, will hold in exclusion of the mortgage. Digest of 1825 page 194 sec. 1, 2, 3 and 4 same book, do 196 do 9.

3. Because Ray acquired all the interest in the property, upon which the mortgage could operate, from Wash by his suit in chancery, and not directly by his purchase under the execution of Howe against Bruffee.

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1840.

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others
v
Bruffee adm'r
of Bruffee,

4. But for the suit of Ray v Wash there was nothing upon which the plaintiffs could enforce their mortgage, nor would they ever have attempted to have done so had not Ray got the title in the lot as aforesaid.

5. I will further submit whether their can by three plaintiffs joined in one action shewing three separate, independent, and distinct interests, as in the present action, 1, Milam for himself, 2, Alford adm'r. of Bates 3, Charles Rankin adm'r. of Honey.

At law as well as in equity the courts will not take cognizance of distinct and separate claims or liabilities of different persons in one suit, tho' standing in the same relative position, 1 Chitiy, pl. 7-8.

Opinion of the Court by Tompkins Judge.

This was a petition filed under the statute, to foreclose a mortgage on certain property in the county of Washington.

The petition was filed by Milam and others against Bruffee and others: it was demurred to and the demurrer sustained by the circuit court, and to reverse the decree of that court this writ of error was sued out.

The bill states that on the 29th day of March, in the year 1827, James Bruffee and wife executed to Elias Bates, John W. Honey, and the said William Milam, a mortgage deed on certain property, to secure to the said persons the payment of the following sums of money, to wit: to Elias Bates and John W. Honey the sum of \$199,18, and to William Milam the sum of \$140: that the land aforesaid was subject to redemption for one year after date of said mortgage, and after that time liable to be sold by the petitioners: that James Bruffee died leaving these debts unpaid, and that they have not been paid since his death: that on the 14th day of May 1827, John Howe filed in the office of the clerk of the circuit court of Washington county an account for labour, materials &c. applied to building a house for the said James Bruffee, on the said land, in order to establish a lien upon the said house, under the law for securing to mechanics and others payment for their labour &c. passed 19th December 1821, see digest of 1825 p. 194; and that at the March term

of the circuit court of Washington county, in the year 1829, the said Howe obtained a judgment against the said Bruffee for \$255; and that to satisfy this judgment the lot of land on which the house, built by said Howe as aforesaid, stood, was sold, and that the said James S. Ray became the purchaser at the price of \$202: that the petitioners believe that the said Ray, either has conveyed or promised to convey the said lot of ground to one Fielding McCormack, his son-in-law, and therefore they the said petitioners pray that the said James S. Ray, Fielding McCormack, William W. Smith, who is in the actual possession of the premises, and Robert C. Bruffee administrator of the said James Bruffee deceased, be made parties; the petitioners further state that their mortgage deed was recorded before the 14th day of May 1827. The petition concludes with a prayer that the mortgaged premises may be sold &c.

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others
v
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of Bruffee,

To this petition there was a demurrer, which the circuit court sustained, and to reverse its judgment this writ of error was sued out.

The second section of the act makes it the duty of every person, wishing to avail himself of the benefit of this act, to file with the clerk of the circuit court of the county in which the building to be charged with the lien is situated, and within one month after such demand shall have accrued a just and true account of the demand justly due him, after all just credits are given; which is to be a lien upon the building &c. and the clerk is required to make an abstract thereof in a book to be kept for that purpose, containing the name of the person laying or imposing the lien, and of him against whom or upon whose contract it is imposed &c.

The third section of the act requires the person wishing to proceed against any property upon which he shall have a lien by virtue of this act, to commence his suit in the ordinary form, and provides that no execution shall issue against the property charged with such lien unless the defendant shall have owned or possessed the said property, at the time of the commencement of the said suit. The time then at which this lien commences, is fixed by the act itself at the time of the commencement of the suit, for it ex-

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On a judgment obtained under the provisions of the act of 19th Dec. 1821 (R. C. 1825, p. 195,) concerning "buildings," the execution can only issue against such property, charged with the lien, as the defendant owned or possessed at the time of the commencement of the suit.

In proceedings under the act concerning "mortgages," all persons having an interest in the mortgaged property may

pressly declares, that no execution shall go against the property charged with such lien, unless the defendant shall have owned or possessed the said property at the time of the commencement of the said suit. And certainly the framers of this law never could have intended that the plaintiff in such judgment should sell any greater interest in the said property than the defendant might happen to own or possess at the time of the commencement of the suit, in which the judgment was obtained; when this suit was commenced we are not told on the record, but we are told that the mortgaged deed of the petitioners was recorded before the 14th day of may 1827, which is the day when Howe under whom the defendants in error claim, filed his account; and he could not have commenced his suit before he filed his account, the probability is, that as he did not obtain a judgment till the March term of the circuit court for Washington county in the year 1829, the suit was commenced some months after the account was filed. The demurrer admits every material statement in the bill; it is admitted then that the mortgaged deed was recorded before the account of Howe was filed, consequently the deed of mortgage must have been recorded before the commencement of the suit. for the account must, by the requisition of the act, be filed before the commencement of the suit. At the time then when this suit was commenced the petitioners had a lien on this lot of land on which the house is built, and consequently on the house itself, to secure the payment of the money due them. Howe, then could sell nothing but the equity of redemption which alone was in Bruffee when Howe's suit was commenced.

But it was also contended by the counsel for the defendant in error that the petitioners could not join in these proceedings, and authorities were read from Chitty which might have been of more weight had this been a common law proceeding. The proceeding is a creature of the statute brought into existence six or eight years before courts of equity had even a legal existence under the Territorial Government; and twelve or fifteen years before courts of equity existed here for any practical purpose; and this statutory proceeding more resembles the proceedings of a

court of equity, than those of a court of common law. If each one of the petitioners had filed his separate petition it would have become necessary that each should make the two others co-defendants, with the other defendants. No advantage would have been gained by such a course, and the costs would have been much greater; indeed they would have been oppressive, and the representative of the deceased might well have contended that as his intestate gave them a joint interest in the land they ought to join in their petition, and not oppress him with separate suits.

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1840.

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v
Bruffee adm'r
of Bruffee,

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of the same.

The proceed-
ings under
this act more
resemble
those of a
court of equi-
ty, than those
of a common
law court.

The judgment of the circuit court in such cases is like a decree in chancery, it directs the mortgaged premises to be sold and the principal and interest to be paid to the petitioners, and the remainder to the administrator. The court can and ought to distribute the proceeds of the sale to each petitioner according to his right, and should the mortgaged premises not be sold for enough to satisfy the demands of each party, then the court will apportion the proceeds, in separate actions, this could not be so well done. So far am I from considering it to be wrong for the petitioners to proceed jointly, that had they proceeded separately, I should have considered it to be the duty of the circuit court to make them consolidate their actions, and pay the costs incurred by their separate proceedings. For the reasons above given, I am of opinion that the judgment of the circuit court ought to be reversed, and Judge Napton concurring it is accordingly reversed, and the cause will be remanded for further proceedings, and that the defendants in error have leave to amend their pleadings.

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1840.

SHORE & PARKINSON'S EX'RS V. THE STATE.

Shore and
Parkenson's
Ex'rs.

v

The State.

1. Murder, except in the first degree, is a bailable offence. Quere, whether the finding of an indictment for murder in the first degree, renders the *presumption so great* as to deprive the circuit court of power to admit to bail?
2. A recognizance to appear on the *first day* of the term is forfeited by the failure of the cognizor to appear on that day. His appearance on a subsequent day of the term will not save his recognizance.

Appeal from the Circuit court of Washington county.

Cole for Appellants.

1st. That the circuit court took the recognizance of bail without authority of law, and that the same is void.

2nd. That the absolute forfeiture of the recognizance of bail, entered on the first day of the term by which the bail were prevented from surrendering Millsap during the term, was a proceeding against law.

Brickey for Appellee.

1. Is the defendants 2d plea good in law, that the circuit court could not take bail or recognize an individual against whom there was an indictment for murder?

2. Is the 3rd plea of the defendants good in law to bar the state from proceeding by *scire facias* upon the recognizance? Dig Const., 28th page, sect. 10-11-12. Digest sect. 19, page 477, sec. 26. 1 Bacon Ab'r. 356. Do. do. 355. 2 do. do. 142. 1 Black. Com. 298.

Opinion of the Court by Napton Judge.

A *scire facias* was issued by the circuit court of Washington county against Shore and Parkinson, on a recognizance which they had entered into for two thousand dollars, conditioned for the appearance of one James Millsap, on the first day of the March term of said court in the year 1838. The death of Parkinson having been suggested, Evans and McGready, his executors, are made parties. On the return of the writ, four pleas were filed. Two of the pleas were nuli tiel record, and payment, on each of which issue was taken. The second plea set forth that the principal in the recognizance, Millsap, was indicted for murder, and that the circuit court had no lawful power to take a recognizance of bail in such case, the said offence of murder not being bailable.

The third plea alleged, that the action should not be sustained, because the forfeiture of said recognizance was taken on the first day of the term, when by law such forfeiture could only be taken on the last day of the term, the said recognizors having the whole term to deliver up the body of the said Millsap in discharge of their recognizance, which they were prevented from doing by reason of the said forfeiture being taken on the first day.

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1840.

Shore and
Parkinson's
Ex'rs.
v
The State

To each of these pleas the attorney for the state demurred, and the demurrer was sustained. The issues on the remaining pleas were found for the state, and judgment given accordingly.

The only question for the consideration of this court, arises on the correctness of the judgment given by the circuit court on the demurrer.

By the constitution of this state, every offence is bailable, except capital offences where the proof is evident or the presumption great. Whether the finding of an indictment by a grand jury, renders the presumption so great as to deprive the circuit court of any power to bail, is, I think, not necessary to be decided in this case. The plea alleged that the principal recognizor was indicted for murder, but did not aver that it was for murder *in the first degree*. Now by our statute murder is not of itself a capital offence, for all its grades, except the first, are punishable by imprisonment in the penitentiary. It does not appear to this court, from any thing in the record, but what this indictment might have been for a species of murder not capital. The court did not err therefore in sustaining the demurrer to this plea.

Murder, except in the first degree, is a bailable offence. Quere, whether the finding of an indictment for murder in the first degree, renders the presumption so great as to deprive the circuit court of power to admit to bail?

The second plea is bad in several respects. It does not aver that the term continued more than one day, and for aught that appeared to the court the first day of the term may have been the last. In addition to this, no offer to appear on any other day is positively averred, but that defendants by the forfeiture of the recognizance on the first day were prevented from afterwards appearing.

The plea however would not have been good, had it been amended in these particulars. The recognizance was for the appearance of Millsap on the first day of the term, and his appearance on the second or third day could not be plead.

A recognizance to appear on the first day of the term is forfeited by

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1840.

Shore and
Parkenson's
Ex'rs
v
The State

This court has decided in the case of *Friar vs. Ray*, (5 Mo. Rep. 512) that the fiction of law in England which constitutes the whole term but one day, has no existence here, and that our statute when using this term, has reference to natural days. The judgment of the circuit court is therefore affirmed.

the failure of the cognizor to appear on that day. His appearance on a subsequent day of the term will not save his recognizance.

JONES V. SHAVER.

A sold his "equitable title" to a tract of land to B, who executed his note to A for the purchase money. It turned out that A had no title available at law or in equity: Held, that there was a total failure of consideration.

Error to the Circuit court of Washington county.

Frissell for Appellant.

1st. That the equitable title of Jones in the lots sold to Shaver, constituted a valuable consideration for the bond sued upon. *Greenleaf vs Cook*, 4th Cond. R. 7; 2 Peters 182 Story J.; *Violet vs. Potter*, 2 Cond. Rep. 214; *Chitty* on Contracts 5 to 8.

2nd. Where land has been bona fide sold but not conveyed until after a judgment has been rendered against the seller, in the county where the land lies, the lien of the judgment does not extend to the land so sold, and the purchaser takes the title unaffected by the lien. *Sedgewick vs Hollenback* 7 John 376; Mo. Stat., 339, s. 2.

3rd. That the delay of Shaver for three years to procure the conveyance, when during all that time he could have had it upon request, would render him liable to pay the price even if it had happened that he had lost the lots, the loss happening through his own negligence.

4th. That hypothetical and speculative instructions if accepted to, are error. *Chiral and others vs Reinerken*, 2 Pet. 625.

5th. That it was the duty of Shaver the purchaser to prefer the deed and present it to masters to execute. *Sugdon on vendors*, 163-5.

Brickey for Defendant in Error.

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1840.

Jones
v
Shaver.

1. That if the consideration for which the bond was given has wholly failed the plaintiff cannot recover, consequently the circuit court committed no error.

2. The evidence preserved in the record shews that Jones had no right to the land sold to Shaver, and that the bond here sued upon was given in consideration of that land therefore void, and cannot be enforced against the defendants.

Opinion of the Court by Napton Judge.

The appellant sued Shaver in the circuit court of Washington county, on a note for \$325,00, by petition in debt. Defendant pleaded that the consideration of the note was a house and certain lots in the town of Caledonia, to which Jones at the time of the execution of the note had no title, and yet had none. Replication was filed, and issue taken. Defendant filed his bill for discovery, calling on Jones to state the consideration of said note, and whether he ever had or yet had any title. Jones' answer admits the note to have been executed for the consideration charged, but states that he purchased the lots from one Masters, and had paid Masters for the same; that Masters had not made him any title, but that the fact was well known to Shaver, and that he sold Shaver his (Jones,) equitable title. He states further that he gave Shaver an order on Masters for the title, and that Masters had been always ready to make the title to Shaver upon request.

Evidence was given in the trial conducing to show that Masters had always expressed a willingness to make a title to Shaver, until perhaps some two or three years after the transaction between plaintiff and defendant, when it seems he became doubtful as to the title of some land which Jones had let him have for the lots. Some judgments against Masters, amounting to about five hundred dollars, were offered and given in evidence, for the purpose I suppose of throwing a lien on the lots.

The jury found a verdict for the defendant, and the judg-

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1840.

Jones
v
Shaver

A sold his
"equitable
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tract of land
to B who exe-
cuted his
note to A. for
the purchase
money. It
turned out
that A. had
no title avail-
able at law or

ment went accordingly; the case is brought here by writ of error.

The court is of opinion, without a particular investigation of the testimony, that the answer of Jones alone was sufficient to warrant the finding a total failure of consideration. Jones does not show any title nor pretend to offer any which is of any legal validity, or would be of any avail or benefit to Shaver. He supposed himself to have an equitable title, but according to his own statement, he had no title either legal or equitable. He had nothing by which he could enforce a conveyance from Masters to himself, much less could he transfer such a power to Shaver. Judgment affirmed. In equity: Held, that there was a total failure of consideration.

6	644
98	560
6	644
139	217
6	644
142	609

THE STATE V SPEAR.

- 1 In criminal prosecutions, where a conviction would subject the defendant to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is, under the State constitution, a bar to any subsequent trial for the same offence.

Appeal from the Circuit Court of Cape Girardeau county
Brickey for the State.

1. The circuit court erred in excluding proper and competent evidence offered on behalf of the State.
2. The court erred in not permitting the evidence offered by the State to go to the jury as circumstantial evidence to sustain the indictment.
3. The court erred by giving instructions to the jury which the state of facts from the record did not warrant.

As to the statutory provisions on this subject, (see Digest page 312, section 3; 4 Mo. Rep. 487.)

Opinion of the Court by Napton, Judge.

The appellee was indicted at the February term of 1839, of the Cape Girardeau circuit court, for selling spiritous liquors to an Indian. The indictment contained two counts; the first of which charged, that defendant sold a half

pint of whisky to a certain Indian, whose name was unknown to the grand jurors; and the second charged that defendant gave the said liquor to an Indian, &c. Upon the indictment the defendant was tried, and acquitted by the verdict of a jury, the State appealed.

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1840.

The State
v
Spear

From the bill of exceptions it appears that after the State had given evidence conducing to show one instance of defendant selling or giving liquor to an Indian, the attorney for the State desired to give other breaches of the statute committed on the same day, and at the same place, by selling liquor to other Indians. This the court excluded. The court also instructed the jury, that they must be satisfied that the Indian to whom the liquor was sold or given was a full blooded Indian, and that the law prohibiting the sale of liquors to Indians did not extend to half breeds.

The counsel for the defendant moves this court to dismiss the appeal, because an appeal does not lie for the State in a criminal case.

Whether an appeal to this court lies in a criminal case, as well for the State as for the defendant, I do not deem very material to determine in this case. The statute gives an appeal in criminal cases generally, without any exclusion of the State from its benefit, and I see no reason why the State should not have an appeal as well as a writ of error, which it is admitted will lie.

But whether the case was brought here by appeal or by writ of error, I hold that the verdict of acquittal is a complete protection to the defendant against any further proceedings. The constitution declares, (art. 13, sec. 10,) that no person, after having been once acquitted by a jury, can for the same offence be again put in jeopardy of life or limb. By this provision I understand, that in all criminal prosecutions where a conviction would subject him to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is a complete bar to any subsequent trial. The offence charged in this indictment was punished by fine and imprisonment.

In criminal prosecutions, where a conviction would subject the defendant to capital punishment, or would render him liable to be restrained from his personal liberty, an acquittal by a jury is, under the State Constitution, a bar to any subsequent trial for the same offence.

With this view of the case it is unnecessary to investigate

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1840.

The State
v
Spear

the propriety of the instructions of the circuit court. Its judgment should, in my opinion, be affirmed.

Tompkins, Judge.

I believe the statute gives the State no appeal, and that it never intended the accused to be put on his trial a second time after he had been acquitted. I do not feel well satisfied that the constitution precludes the legislature from giving the State the right of appeal in cases of lighter offences.

I concur in every other part of this opinion.

6 646
40a 576
40a 631
6 646
40a 577

CASEY v THE STATE.

1. In a prosecution instituted under the act concerning "Groceries and dram shops" for suffering spirituous liquor to be drank in the grocery of deft. evidence that deft. sold the liquor, and that the same was drank in his grocery, is presumptive evidence that the liquor was drank in the grocery with the permission of defendant.

Appeal from the Circuit Court of Washington county.

Cole for Appellant.

It is insisted that the offence as alleged in the information and summons, is not warranted by the statute, the first being conjunctive, the latter in the disjunctive. Act 1839, page 52, sec. 18.

The offence proved is not punishable by the grocers law. 16 sec. 36 page 55.

The offence proved, if punishable at all, is an offence in violation of the dram shop law, and should have been proceeded against, and in that law, (16 sec. 36.)

It is not proved that Casey suffered the liquor and wine sold to be drank at his grocery, nor is it proved that the same were drank there. Act. 1839, sec. 18.

Brickey for the Appellee.

Is the act passed at the last session of the Legislature, "an act to license and regulate groceries and dram shops" unconstitutional? (See last acts page 50 and following.)

Opinion of the Court by Napton, Judge.

In compliance with the duty imposed by the 47th section

of the act "to license and regulate groceries, dram shops and for other purposes;" approved February 13th, 1839, John Brickey, a justice of the peace for Washington county, filed information in writing before Eugene Mara, another justice of the same county, charging the appellant with having sold wines and liquors, and suffering the same to be drank in his grocery. The offence is specified in the 18th section of the above mentioned act; the summons of the justice in pursuance of the information, advised the appellant Casey, that he was charged with a violation of the section aforesaid, in consequence of which he forfeited to the county of Washington twenty dollars. The summons pursued the form prescribed by the act, a trial was had, witnesses were examined, the defendant was found guilty, and judgment entered against him for twenty dollars and costs. From that judgment the defendant, Casey, appealed to the circuit court, and judgment being again unfavorable he appeals to this court.

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1840.

Casey
v
The State

From the bill of exceptions the following facts appear to have been given in evidence. The defendant was a grocer, at the time of committing the alleged offence, and sold wines and spirituous liquors in quantities less than one quart, and received pay therefor, and the said wines and spirituous liquors were drank at the house of said appellant.

But two objections have been urged in this court to the judgment below.

First, It is objected that the testimony proved the defendant guilty, not only of selling liquors to be drank about his grocery, but also of selling liquors in less quantities than his grocery license authorized. In other words the testimony not only sustained the charge preferred, but also proved the defendant guilty of another violation of the same statute. It is hardly necessary to say, that the defendant has no right to complain on this ground.

It is next urged that the testimony was insufficient to convict the defendant of the offence charged, because the State did not prove, that the defendant suffered or permitted the liquor to be drank in his grocery house. The witness proved that the liquor sold by defendant was drank at his

In a prosecution instituted under the act concerning "groceries and dram shops," for suffering

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Casey

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spirituous li-
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house, and the legal presumption arises, that this was done by his permission, as every man is supposed to have a control in his own house. If this was not the fact, the defendant could have shown that he forbade the drinking, and it was incumbent on him to show the matter of defence. Judgment affirmed.

defendant, evidence that defendant sold the liquor, and that the same was drank in his grocery, is presumptive evidence that the liquor was drank in the permission of defendant.

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GEORGE, a man of color, v. CRAIG impleaded with NEALY.

An appeal will not lie from the judgment of the circuit court on an incidental matter, the suit being yet undetermined.

Error to the Circuit court of Cape Girardeau.

Opinion of the Court by Napton Judge.

The record in this case shows that in September 1838, the plaintiff George filed his petition in the circuit court of Cape Girardeau county, with a view to institute a suit for the recovery of his freedom. The suit was accordingly brought by leave of the court in *forma pauperis*, and in pursuance of the 8th section of the act, "to enable persons held in slavery to sue for their freedom," the court directed the petitioner to be hired out by the sheriff. At the February term 1840, on the application of the defendant, the court ordered the proceeds of the hire accruing from September 1838, to November 1839, to be paid over to defendant.—From this decision of the court the plaintiff appealed.

An appeal
will not lie
from the judg-
ment of the
circuit court
on an inciden-
tal matter,
the suit being
yet undeter-
mined.

This court is of opinion that the decision of the circuit court on the collateral point saved by the bill of exceptions, must be considered incidental to the main suit which is yet undetermined. It is not therefore such a final judgment as will authorise an appeal. The appeal is therefore dismissed.

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THE STATE V. MCCOURTNEY, and others.

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The name of the prosecutor must be endorsed on an indictment for a riot, before the bill is returned by the grand jury.

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Error to the circuit court of Franklin county.

Brickey for the State.

1. Is not this indictment good in form and substance?
2. Did not the circuit court err in sustaining the motion of the defendant and in quashing the indictment?
3. The court erred in overruling the motion made on behalf of the State to permit a prosecutor to be endorsed upon said indictment, (before the defendants motion was decided,) if a prosecutor in such case should be considered necessary under the statute. Digest 202, sec. 6-7-8; 4 Blk. Com. 146; Digest 481, sec. 22, 23; 3 vol. Mo. Rep. 125, (State vs. Wilson.) 3 Bac. Ab'r. R. 574.

Opinion of the Court by Napton Judge.

Julius Emmons, Sanford Whitworth, James McCartney, and seven others, were indicted by the grand jury of Jefferson county at the June term 1839. The indictment contained three counts. The first count charged that defendants, with others, on &c., at &c., "unlawfully, riotously, and routously did assemble and gather together, with intent to disturb the peace of the people there being, and being so assembled with the intent aforesaid, upon the body of one James Pepper, in the place then and there being, unlawfully, riotously and routously did make an assault, and him the said James Pepper then and there unlawfully, &c., did beat, bruise, wound and ill-treat, and other wrongs, &c."

The second count charges that defendants on &c., at &c., "unlawfully did assemble with intent to do an unlawful act with violence, that is to say, to beat, bruise and ill-treat one Asa Scott, and to the terror of the people of the state, then and there being, and being so assembled with the intent aforesaid, unlawfully and with violence, upon the body of the said Scott, then and there did make an assault, &c., to the terror of the people, &c."

The third count charges the same offence with some immaterial variations.

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A change of venue was awarded to Franklin county, where the defendants appeared and moved to quash the indictment, because no prosecutor was endorsed. This motion was sustained, and the state brings the case here by writ of error.

By the bill of exceptions it appears that the attorney for the state, on the hearing of the motion to quash, moved the court for leave to permit the prosecutor to endorse his name, as such, on the indictment. This motion was overruled by the court, and exceptions duly taken.

The name of the prosecutor must be endorsed on an indictment for a riot, before the bill is returned by the grand jury.

The 22nd section of the 3rd article of the act concerning practice and proceedings in criminal cases provides, that "no indictment for any trespass against the person or property of another, not amounting to felony, shall be preferred, unless the name of a prosecutor is endorsed as such thereon, except where the same is preferred upon the information or knowledge of two or more of the grand jury, or on the information of some public officer, in the necessary discharge of his duty, in which case a statement of the fact shall be made at the end of the indictment, and signed by the foreman of the grand jury."

The 24th section of the same chapter says, "if any indictment so endorsed, shall be returned by the grand jury, 'not a true bill,' the prosecutor shall be adjudged to pay the costs."

From this last section it might well be inferred, that after the indictment was found by a grand jury to be a true bill, the responsibility of the prosecutor ceases. It seems very reasonable that when the public officers of the state have endorsed the charge, by this deliberate act the party aggrieved should be relieved from further liability. But the 8th section of the 7th art. of the same act declares, that "if upon the trial of any indictment, whereon the name of a prosecutor is endorsed as such, according to law, the jury shall acquit the defendant, they shall determine and return, together with their verdict, whether the prosecutor or the county shall pay the costs, and the court shall render judgment accordingly." This section is a revival of the old law of 1825, and evidently contemplates the continued respon-

sibility of the prosecutor until the jury bring in their verdict. SEPT. TERM.
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The question then arises whether the present indictment is such an one as requires a prosecutor. The indictment is founded on the 6th section of the 7th article of the act concerning crimes and punishments. That section provides, that if three or more persons shall assemble together with the intent, or, being assembled, shall agree mutually to assist one another to do any unlawful act, with force or violence, against the person or property of another, or against the peace, or to the terror of the people, and shall accomplish the purpose intended, he shall be punished as specified in that act. This is nothing more nor less than a common law riot, of which three kinds are specified: First, unlawful and forcible acts against the person or property of another: Second, Unlawful and violent acts against the peace, merely: And third, Such acts committed to the terror of the people. If these two last species can exist without the first, then there might be an indictment for a riot which would not come within the terms of the 22d section of the third article of the act concerning practice and proceedings in criminal cases. But the indictment charges both a breach of the peace, and unlawful violence against the person. It has been urged that inasmuch as the breach of the peace is the gist of the offence, the statute requiring a prosecutor is not applicable. But the same may be said of assault and batteries, which are clearly within its provision. A public prosecution is in no instance aimed to punish the private wrong sustained, but to assert the majesty of the offended law, and protect the peace of society. Assaults and batteries are as much breaches of the peace as riots, though the latter are of an aggravated character, and the aggravation of the offence consists merely in the increased number engaged.

But if the act concerning the endorsement of prosecutors has no applicability to the indictment, to what indictments will it apply, since the jurisdiction of assaults and batteries has been taken from the circuit courts? And even before these offences were made solely cognizable by justices, what

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offence *against the property* of another was indictable unless some such one as is described in the indictment?

The court did not in my opinion err in quashing the indictment.

But the attorney for the State, pending the motion to quash, moved for leave to have the prosecutors name endorsed. The statute requires this endorsement to be made before the bill is found, it is consequently a part of the indictment, and must appear on the back of the indictment, as well as the endorsement of the foreman of the grand jury that the same is a true bill. This defect could not be amended. Our act of amendments does not apply to criminal proceedings, and the accused is entitled to the benefit of the law, however technical or unnecessary it may seem.

For these reasons the judgment of the circuit court should in my opinion be affirmed.

